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NO. 221

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

MARY ZACHARIE BROCK, ET AL.,
Petitioners,

VS.

BARNSDALL OIL COMPANY, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, Mary Zacharie Brock and her husband, William Elton Brock, Allison Owen, E. Pendleton Owen, Bessie Howard Pickering and her husband, James E. Pickering, Theodore Zacharie Hardee, George W. Hardee, Sydenham Hardee, a person non compos mentis represented herein by said George W. Hardee as his legal guardian and next friend, Anice Wishart Warden and her husband, Charles Warden, Maurice Fleury Generelly, Jeanette Craighead Watson, a feme sole, Rita Howard Bobb, a feme sole, Elizabeth Howard Fitch, a feme sole, Florence Ellis Nicholls and her husband, Jesse

Crook Nicholls, James Zacharie Nicholls, Florence Nicholls Weitzmann and her husband, Francis White Weitzmann, Jesse Crooks Nicholls, Jr., Andrew Barry C. Nicholls, George Nicholls and Augustus H. Nicholls, a minor, represented herein by his next friend, said Jesse Crooks Nicholls, respectfully state as follows:

This is a petition for a writ of certiorari to review a judgment of United States Circuit Court of Appeals for the Fifth Circuit, which in all things affirmed a judgment of the District Court of United States for the Southern District of Texas, Corpus Christi Division, which denied your petitioners any relief, and which judgment of said appellate court was rendered in cause No. 9662 in said court, entitled Frank A. Ash and Mary Zacharie Brock, et al., appellants, vs. Barnsdall Oil Company, et al., appellees. The opinion herein of said appellate court is reported in 118 Fed., (2d), 699, the concurring opinion of Circuit Judge Sibley appearing on page 702, on motions for rehearing.

STATEMENT OF THE MATTER INVOLVED

This action was brought by your petitioners in said District Court against one Delaware corporation, namely: Barnsdall Oil Company, and three Texas corporations, namely: Four Bluff Oil Corporation, Humble Oil & Refining Company and Humble Pipe Line Company, for recovery of and title to an undivided two-thirds interest in certain oil bearing land situated near Corpus Christi, in Nueces County, Texas, and for an accounting by said four defendants below as to several million barrels of oil alleged to have been produced and removed by said four defendants from said land. (R. 34 to 36)

Your petitioners brought said action as heirs at law of James W. Zacharie, deceased, alleging that said decedent was a devisee of said undivided interest in said

land in and under the last will and testament of one John Peter Schatzell, deceased, which was duly probated in Nueces County, Texas.

An intervention was filed in said cause, in trial court, by Frank A. Ash and seventy-nine (79) others, as alleged heirs at law of said John Peter Schatzell, deceased, and one G. H. Nagel joined therein as alleged assignee of some or all of said alleged heirs of said Schatzell. It seems unnecessary here to set out said names; they appear on pages 97 to 104, both inclusive, of record in Circuit Court of Appeals.

Said alleged heirs of Schatzell, deceased, were also denied any relief and they prosecuted a separate appeal to said Circuit Court of Appeals. Said appeal and that of your petitioners were covered by one printed transcript of the record.

In the trial court various persons and corporations, other than said alleged heirs at law of said Schatzell, deceased, intervened as defendants in the cause, claiming as owners of divisible parts of the land involved or as owners of oil and gas royalty interests therein. (R. 220, 275, 281 and 284)

While the case was in the District Court your petitioners, plaintiffs below, compromised with all four of the original defendants as hereinabove named and also with all intervening defendants other than these, namely: J. O. Phillips; Haynie E. Edwards; J. P. Webster & Sons, a co-partnership composed of A. A. Webster, Mrs. Ruby Webster March (joined by her husband, John Abe March) and Mrs. Corabel Webster DeWees, a feme sole; A. A. Webster, individually; Don P. Webster; D. R. Snow; Mrs. Mary C. Collier, a widow; Mrs. Mabel Eppright, a widow; Mrs. Gladys Hooper and husband, Sidney L. Hooper; Alwyn S. Collier; Dr. G. R. Collier; E. F. Gracey; R. J. St. Germain; George R. Brown; J. C. Poole;

George Harrington; D. A. Ross; J. L. Camp; C. C. Wurzbach; W. W. Kelley; J. T. Smith; James C. Nelson; Stoddart J. Smith; Royalties Management Corporation; R. L. Howard; Sandrock Royalty Company; Redrock Royalty Company; Houston Royalty Company; Sabine Production Company; and Robertson Securities and Investment Company; Alexander Deussen; W. B. Collier; Mrs. Lillian Ware, and husband, S. L. Ware; W. N. Hooper; Betty Rutherford, and husband, P. R. Rutherford; Helen McCoy Hedley, and husband, J. D. Hedley; Lon H. Cron; Mrs. Marian D. Mason; M. Preston Goodfellow; Robert M. Winslow; D. C. Everest; Alice A. Phelan; Alder Realty Company; Mrs. Marjorie M. McKinley, and husband, L. Parker McKinley; Mark C. Meltzer, Jr.; Raymond M. Gunnison; Robert S. Blair; Austin K. Neftel; Dorothy T. Fales; Thomas G. Blakeman; Mrs. Rose Haworth Tenney, and husband, ...Tenney.

In the final judgment of the trial court (R. 355 et seq.) it was among other things adjudged as follows: that the title to the land involved herein passed to and vested in one Robert Mott by virtue of a deed executed and delivered to him by one Samuel W. Fullerton acting as administrator pro tempore of the estate of said John Peter Schatzell, deceased, and therefore, that none of your petitioners as plaintiffs and none of said alleged heirs of John Peter Schatzell, deceased, as intervening plaintiffs should recover anything against any of said four original defendants or as against these intervening defendants, to-wit: said J. O. Phillips and others last above named.

Said judgment was based upon a pre-trial stipulation and order and findings of fact and conclusions of law made by the district judge pursuant to Rule 52 of Federal Rules of Civil Procedure. (R. 25 to 30 and 369 to 386)

GROUNDS OF JURISDICTION

Your petitioners believe that the Supreme Court of the United States has jurisdiction to grant them the writ of certiorari herein since this is a civil case in a Circuit Court of Appeals, under and pursuant to Section 240 of the Judicial Code of the United States as amended and re-enacted in and by the Act of February 13, 1925, chapter 229, 43rd Statutes, 936.

The sole ground of jurisdiction of said District Court of the United States for the Southern District of Texas was diversity of citizenship between your petitioners, as plaintiffs below, and all and singular the other parties to this cause in the trial court, original defendants, intervening plaintiffs and intervening defendants, respectively.

In the trial court it was stipulated, and said court found, that when this suit was instituted below every one of your petitioners was a non-resident of the State of Texas and a citizen of some state other than Texas, or a citizen of some foreign state or country; also, that on date of institution of suit every defendant herein was either a citizen of the State of Texas or a citizen of some state of the United States of which none of the plaintiffs, petitioners herein, was a citizen: also, that the amount in controversy herein is in excess of Three Thousand Dollars ($3,000.00) exclusive of interest and costs. (R., 25 and 26)

Final judgment was rendered in the District Court on March 20, 1940. (R., 355, 364)

On June 12, 1940, your petitioners, plaintiffs below, filed their notice of appeal and their appeal bond, duly approved. (R., 668 and 686.) And on the same date they filed their statement of points on which they intended to rely on their said appeal. (R., 698)

On July 8, 1940, the United States district judge by order extended the time for the filing and docketing of the cause in said United States Circuit Court of Appeals for the Fifth Circuit from forty (40) days to ninety (90) days from and after June 4, 1939. (R., 751)

The original record on appeal was received by the clerk of said United States Circuit Court of Appeals on August 29, 1940: printed copies thereof were filed with said clerk on November 30, 1940.

On March 3, 1941, said U. S. Circuit Court of Appeals entered judgment in all things affirming judgment of the trial court. (R., 770) On the same date the opinion of that court was filed. (R., 764)

On March 24, 1941, your petitioners filed with the clerk of said appellate court their petition for a rehearing in this cause. (R., 784)

Your petitioners' said motion for a rehearing was denied on March 29, 1941. (R., 796 and 799)

On rehearing Circuit Judge Sibley filed a concurring opinion. (R., 797)

From the foregoing it is apparent, (a) that said United States District Court had jurisdiction herein, based solely upon diversity of citizenship and amount involved, and (b) that said United States Circuit Court of Appeals had appellate jurisdiction herein and (c) that this petition for writ of certiorari has been seasonably filed with the clerk of United States Supreme Court, and that said court has power to grant this petition.

THE QUESTIONS PRESENTED

John Peter Schatzell died October 23, 1854, at his home in Corpus Christi, Texas, leaving an estate inventoried at $145,300.00, including the land involved herein

valued at $10,000.00. (R., 443, 448) In July, 1855, James W. Zacharie, the ancestor of your petitioners, filed in County Court of Nueces County, his application to probate the holographic will of said Schatzell; said application was contested by alleged heirs of said testator but their contest was overruled and the will was probated on January 5, 1856. (R., 487) Soon thereafter one Samuel W. Fullerton was appointed and qualified as administrator of estate with will annexed. On March 26, 1856, said alleged heirs of Schatzell instituted certiorari proceedings in District Court of Nueces County seeking to vacate said order of probate of will. (R., 416) Some ten years or more thereafter said certiorari cause was dismissed. (R., 507)

Because of said certiorari proceedings and pursuant to applicable Texas laws, on April 28, 1856, said Fullerton was appointed and qualified as administrator pro tempore of estate during the pendency of the contest evidenced by said certiorari proceedings. (R., 502)

While said certiorari cause was still pending in the District Court and while said Fullerton was still acting merely as administrator pro tempore of the Schatzell estate, said administrator pro tempore applied to said County Court, sitting in probate, for an order to sell the land involved herein and said court attempted to grant said application and to authorize said sale of land by said administrator pro tempore: and thereafter on March 1, 1860, acting pursuant to an order of said County Court, sitting in probate, which attempted to confirm a report of sale made to it by said administrator pro tempore, (which sale was made for a $3,100.00 note secured by mortgage on the land), said Fullerton as such administrator pro tempore of estate executed and delivered to one Robert Mott an attempted conveyance of said land involved herein. (R., 524)

The basic questions presented herein are these:

(a) That said County Court of Nueces County, sitting in probate, had no power or authority under applicable Texas laws and decisions to authorize said Fullerton as a mere administrator pro tempore of the Schatzell estate thus to sell and convey said land to said Mott; and

(b) That, in any event, said attempted sale of land to Mott was void because no provision therefor was made or contained in the original order of April 28, 1856, appointing said Fullerton as such administrator pro tempore of estate, and that said County Court, sitting in probate, had no right or power thereafter to enlarge or increase the powers of such administrator pro tempore so as to authorize such attempted sale and conveyance of land to Mott.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

Said Circuit Court of Appeals for the Fifth Circuit has in this case decided an important question of local law in a way which conflicts with applicable statutes of the State of Texas and applicable Texas decisions, and has herein so far departed from the accepted and usual course of judicial proceedings in Texas as to call for an exercise of the Supreme Court's power of supervision.

On March 20, 1848, Texas Legislature enacted Chapter 157, General Laws of Second Legislature, entitled: "An Act to regulate proceedings in the County Court pertaining to the estates of deceased persons": that law was in force, with unimportant exceptions, until 1876. Under that law and the then Constitution of the State of Texas, the County Court of Nueces County, Texas, had general probate jurisdiction.

The immediately applicable parts of that law were as follows:

"Section 27. That wills shall be probated, and letters testamentary or of administration, **with full powers,** shall be granted only in open court at a regular term thereof, after application in writing, and notice, as hereinabove required; but whenever it may appear to the chief justice that the interest of an estate requires the immediate appointment of an administrator, he shall, either in open court or in vacation, by writing under his hand and the seal of the court, attested by the clerk, appoint some proper person administrator pro tem., **with such limited powers** as the circumstances of the case may require. Such appointment may be made without notice—shall **define the powers conferred,** and before being delivered to the person appointed, shall be recorded in the minutes of the court, and the clerk shall endorse thereon a certificate that it has been so recorded, and until such record and certificate are made, the appointment shall not take effect. Such appointment shall cease to be of force on the first day of the term of the court next after the date thereof; unless continued in force by an order entered on the minutes in open court; and in no case shall such appointment continue in force beyond the first day of the second term of the court next after the date thereof."

"Section 28. That pending any contest relative to the probate of a will, or the granting of letters of administration, whether such contest be in the County Court, or in any other court on appeal, it shall be the duty of the chief justice to appoint an administrator pro tem., in the manner prescribed in the preceding section, and **with such limited powers** as the circumstances of the case may require. Such appointment may continue in force until the termination of the contest, and the ap-

pointment of an executor or administrator **with full powers."** (All Bold Face ours)

"Section 29. That before the issuance of letters of administration pro tem., under the provisions of the two preceding sections, the person appointed shall take and subscribe an oath and enter into bond; which bond and oath shall be, in substance, the same as the bond and oath required of other administrators, varying the form to suit the circumstances of the particular case—and such bond and oath shall be filed and recorded in like manner as other bonds of administrators."

Section 38 provided that whenever letters testamentary or of administration should be granted, the chief justice should appoint three disinterested appraisers, while Section 39 provided that every executor or administrator should, immediately after appointment, with assistance of appraisers, make a full inventory and appraisement of the estate. Section 40 provided that said inventory and list should be returned to the court by the executor or administrator within sixty days after his appointment. Section 46 provided that every executor or administrator should, within one month after appointment, publish in some newspaper a notice to all creditors of the estate. Section 47 provided that every money claim against the estate should be presented to the executor or administrator within one year after original grant of letters testamentary or of administration, otherwise payment thereof should be postponed in favor of claims presented within said time.

Section 54 provided thus: "That it shall be the duty of every executor, or administrator, so soon as he shall ascertain that it is necessary, to apply to the chief justice at some regular term of the court, for an order to sell so much of the property of the estate he represents, as he shall think sufficient to pay the expenses of adminis-

tration and the debts of the estate; such application shall be in writing, and shall be accompanied by a statement in writing, of the estimated expenses of administration; and of all the claims against the estate that have been presented to him, specifying what claims have been allowed by him, what rejected, and those upon which suit has been instituted against him; with the condition of such suit or suits, which statement shall be verified by affidavit; upon the presentation of such application and statement, it shall be the duty of the chief justice, if satisfied that there is a necessity for such sale, to order the same to be made."

Section 55 provided that whenever an executor or administrator should neglect to comply with the provisions of said Section 54, any creditor of the estate might, upon notice to the executor or administrator, obtain an order of the court requiring the executor or administrator to proceed as provided for in Section 54.

Section 56 provided for a sale, upon application by executor or administrator or heir or devisee or legatee or "any creditor of the estate", of estate property "that is perishable or liable to waste."

Section 57 made special provision for a sale, under proper order of court, of crops belonging to the estate of a decedent, order of sale to be made upon application of executor, administrator, heir, devisee, legatee or any creditor of estate.

Section 82 provided: "That at the first term of the court after the expiration of twelve months from the time of the original grant of letters testamentary or of administration, it shall be the duty of the executor or administrator to return to the court an exhibit, in writing, sworn to and subscribed by him, setting forth a list of all claims against the estate that were presented to him

within twelve months after the said grant of letters testamentary or of administration, specifying which have been allowed by him; which have been rejected, and the date when rejected; which have been sued upon, and the condition of suit; also, setting forth fully the condition of the estate; and if any executor or administrator shall neglect to return such exhibit at the term of the court named above, it shall be the duty of the chief justice to revoke his letters," without notice to the executor or administrator.

Section 84 provided that at the third regular term of the court after the expiration of twelve months from the original grant of letters testamentary or of administration, the executor or administrator should return to the court "a further exhibit in writing, sworn to and subscribed by him."

Section 86 provided that "at the third regular term of the court after the expiration of twelve months from the original grant of letters testamentary or of administration, or at any term of the court after that, any person interested in the estate may, by complaint in writing, filed in the County Court, cause the executor or administrator to be cited to appear at a regular term of the court, and make an exhibit in writing, under oath to the court," etc.

Section 116 provided that whenever an administrator pro tem., "'shall have been appointed and an executor shall afterwards be qualified, or an administrator appointed, such executor or administrator shall succeed and be made a party to all suits and actions prosecuted by or against such administrator pro tem; and such executor or administrator shall have the right to settle with such administrator pro tem. and receive and receipt for all the estate remaining in his hands; and shall have the right to use, in like manner as is provided for in the

previous section, on the bond of such administrator pro tem., for all the estate not accounted for by him."

Section 135 provided: "That the rights, powers and duties of executors and administrators shall be governed by the principles of the common law, where the same does not conflict with the provisions of this Act."

Of the 137 sections of that very comprehensive probate law only Sections 27, 28, 29 and 116 mentioned, directly or indirectly, an "administrator pro tem" of an estate. On the other hand, the words "executor or administrator" were used in more than thirty of those sections, including these: Section 18, 22, 26, 33, 39, 40, 46, 47, 48, 49, 50, 51, 52, 54, 55, 56, 57, 59, 67, 70, 72, 79, 82, 84, 85, 86, 87, 88, 89, 90, 111 and 135, respectively.

In both Sections 27 and Section 28, supra, the highly significant words "with such limited powers as the circumstances of the case may require" were used as to administrators pro tem.: and in Section 28 those words were used in sharp contrast with the words "full powers" as therein applied to the "executor or administrator" who was to be appointed at termination of the contest mentioned in said Section 28.

That Act is silent as to any power of the probate court to authorize a mere administrator pro tem. to sell and convey property of any kind, more especially land.

That Act is also silent as to any power of the probate court to authorize a mere administrator pro tem. to consider and either allow or reject claims against the estate of the decedent.

On the other hand, that Act is replete with very clear and numerous provisions with respect to the presentation of claims to the executor or administrator, the allowance or rejection thereof by such executor

or administrator, the mode of payment of allowed claims and expenses of administration, etc., etc.

The decision of said Circuit Court of Appeals herein is in conflict with these decisions by appellate courts of Texas, towit:

Alexander vs. Barfield, 6 Tex., 400;
Dull vs. Drake, 68 Tex., 205, and 4 S. W., 364;
Cruse vs. O'Gwin, 106 S. W., 757, writ of error refused by Texas Supreme Court.

The above cited Texas statutes and Texas decisions are discussed in brief for your petitioners, annexed hereto.

It is believed by counsel for your petitioners that in its decision of this cause said Circuit Court of Appeals failed to consider, apply and follow the principles of law announced by this court in many late cases including these decided at the last term, to-wit:

Stoner vs. New York Life Insurance Co.;
Breisch vs. Central Railroad Co. of New Jersey;
Moore vs. Illinois Central Railroad Co.;
Klaxon Co. vs. Stentor, etc., Co.; and
Griffin vs. McCoach.

Wherefore, your petitioners, referring to the attached brief in support of the foregoing reasons for review, respectfully pray that this Honorable Court will issue a writ of certiorari addressed to said United States Circuit of Appeals for the Fifth Circuit, directing said court to send to this court a full and complete transcript of the record in this cause, to the end that this case may be reviewed by the Supreme Court and determined by this court, as provided by law, and that the judgment of said United States Circuit Court of Appeals for the Fifth Circuit may and shall be reversed by the Supreme Court, and that your petitioners may and shall have such other

and further relief in the premises as to this Honorable Court may seem right and just.

AND YOUR PETITIONERS WILL EVER PRAY.

GRADY BARRETT
JAMES M. BARNETT
WALTER M. LEWRIGHT
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Attorneys for Mary Zacharie Brock, et al., Petitioners.

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Respondents.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I.

The opinion herein on original submission appears at page 764 of record; also, at page 699 of 118 Fed. (2d). The concurring opinion of Circuit Judge Sibley, on motions for rehearing, appears on page 797 of record and also on page 702 of 118 Fed. (2d).

II.

GROUNDS OF JURISDICTION

It is believed that the jurisdiction of this court is sufficiently shown on page 5 of the petition for certiorari and that further statement of grounds of jurisdiction is unnecessary.

III.

STATEMENT OF THE CASE

Your petitioners here refer to and adopt the Statement commencing at page 2 of their petition for certiorari.

Here supplementing that Statement:

Pursuant to a pre-trial conference, the District Court entered an order, duly approved by attorneys of record for all of the parties hereto, which among other things provided that all the parties hereto should, within a stated time, file such of their respective abstracts of title, title papers and other documentary evidence as might be regarded by the several parties hereto as relevant or material in the determination of the validity vel non of the alleged conveyance to Robert Mott from Samuel W. Fullerton as administrator pro tempore of the estate of John Peter Schatzell, deceased, which is mentioned in opinion of Circuit Court of Appeals herein; also, that if the trial court should find and hold that the instrument of date March 1, 1860, executed and delivered by Fullerton as administrator pro tempore of estate to Robert Mott and the proceedings with respect thereto had in County Court of Nueces County, Texas, sitting in probate, and said documentary evidence so to be filed within a stated time by the litigants were legally sufficient to pass, and did pass, the title to the land involved herein and that said title was thereby vested in said Robert Mott, then neither your petitioners as plaintiffs nor said intervening plaintiffs asserting title as alleged heirs at law of John Peter Schatzell, deceased, should recover herein, and that in any such event title to said land would be adjudged by the court to and among the several defendants as their respective interests might appear. (R., 27 and 28)

As no question arises herein with respect to the pleadings of any of the parties hereto, it is considered unnecessary even to summarize such pleadings.

The district judge filed findings of fact and conclusions of law under Rule 52 of the Federal Rules of Civil Procedure. (R., 369 et seq.)

The only fact findings deemed material or relevant at this stage of the proceedings may be thus briefly stated:

John Peter Schatzell died in Nueces County, Texas, on October 23, 1854. On the next day thereafter County Court of Nueces County, in the exercise of its admitted probate jurisdiction, appointed administrators pro tem. of estate, who immediately qualified. On November 4, 1854, following due notice, said court appointed the same men as permanent administrators of estate, and they immediately qualified and soon thereafter filed an inventory, appraisement and list of claims of estate. (R., 372)

On July 24, 1855, James W. Zacharie, under whom your petitioners claim here as heirs at law, filed in said court his application for probate of the holographic will of said Schatzell and due notice of said application was given. Alleged heirs of Schatzell filed a contest of said application and on November 1, 1855, the powers of said permanent administrators were suspended and one Samuel W. Fullerton was then appointed administrator pro tem., to serve during the contest of such application for probate of will.

On January 5, 1856, said will was probated but executor named therein did not qualify, and on February 2, 1856, said Samuel W. Fullerton was appointed administrator of estate, with will annexed, and he im-

mediately qualified, and then filed inventory, appraisement and list of claims of estate. (R., 373)

On March 1, 1856 said alleged heirs of Schatzell filed in District Court of Nueces County, Texas, their petition for certiorari, which was granted and the matter was removed to said District Court. Later the venue of said certiorari proceedings was changed to Galveston County, Texas, where no further proceedings were had therein until June 3, 1868, when said court dismissed the certiorari cause. (R., 373)

On April 28, 1856, said County Court of Nueces County, sitting in probate, appointed said Samuel W. Fullerton administrator pro tem of Schatzell's estate to serve during the pendency of said certiorari cause and contest of will, and said Fullerton immediately took oath and filed bond for $184,126.64. Said order of appointment referred to the certiorari proceedings then pending in District Court of Nueces County and defined said Fullerton's duties as such administrator pro tempore as follows: "Whose duty it shall be to gather and take into possession all the assets, demands and evidences of debt or title belonging to said estate, with full power and authority to do and perform all legal acts, and take such proceedings as shall or may be necessary to maintain him in the possession and charge of said estate and property, real and personal, so as to preserve the same and prevent its removal or waste, until the further order and decree of this court." (R., 373)

Pursuant to that order said Fullerton as administrator pro tempore had possession of the Schatzell estate subject to orders of said court.

On October 31, 1859, said Fullerton as administrator pro tempore of estate, still acting under said order of appointment of date April 28, 1856, applied to said

County Court for an order of sale of land in order to pay debts and expenses of administration. (R., 375)

In said application it was stated, among other things, as follows: "And the said administrator pro tem, herewith presents a statement of the estimated expenses of administration and of all claims against the estate which have been presented to him, specifying those allowed and those rejected by him, and those upon which suit has been instituted against him, together with the condition of said suit." In said application said administrator pro tem. suggested that some part of the real estate belonging to said estate be sold.

On November 2, 1859, by due order, said County Court granted said application for an order of sale and attempted to authorize said administrator pro tem. to sell, on a credit of twelve months, at public auction and to highest bidder, the tract of land involved herein. (R., 377)

On February 28, 1860, said Fullerton as administrator pro tem, filed his sworn report of sale of said land to one Robert Mott, for $3,100.00, on a credit of twelve months, "the purchaser securing the payment by a lien on the premises." (R., 378)

On February 29, 1860, said County Court, sitting in probate, entered an order attempting to confirm said report of sale by administrator pro tem. and to authorize him to execute and deliver to Mott a conveyance in due form upon Mott's compliance with the terms and conditions of sale; and on March 1, 1860, said Fullerton as administrator pro tem., acting pursuant to said order of sale and said order confirming sale, executed and delivered to Robert Mott the deed mentioned in opinion in Circuit Court of Appeals. (R., 379)

All of the respondents herein other than alleged

heirs of John Peter Schatzell, deceased, assert title and right under said attempted conveyance to Robert Mott.

SPECIFICATION OF ASSIGNED ERRORS

FIRST ASSIGNMENT OF ERROR

(Error No. 1 in your Petitioners' Motion for Rehearing)

The Circuit Court of Appeals erred in finding that the deed of date March 1, 1860, executed and delivered by Samuel W. Fullerton as administrator pro tempore of estate of John Peter Schatzell, deceased, to Robert Mott was and is valid, and that it conveyed to Mott the title to the land described therein.

SECOND ASSIGNMENT OF ERROR

(Error No. 2 in your Petitioners' Motion for Rehearing)

The Circuit Court of Appeals erred in holding that Samuel W. Fullerton as administrator pro tem. of estate of John Peter Schatzell, deceased, "had the power and authority to make a valid conveyance" of the land involved herein, because "the authority was vested in Fullerton by the order of the court directing that the sale be made" to Robert Mott, since said order was void.

THIRD ASSIGNMENT OF ERROR

(Error No. 3 in your Petitioners' Motion for Rehearing)

The Circuit Court of Appeals erred herein in refusing to follow and apply to the attempted sale made by Fullerton as administrator pro tem to Mott this principle of law which is well established by the several Texas decisions hereinafter mentioned, to-wit: that under the terms and provisions of the Probate Act of March 20, 1848, the chief justice of Nueces County had no power or jurisdiction, EITHER BY STATUTE OR AT COMMON LAW, to authorize the administrator pro tem. of an estate to sell and convey land belonging to such estate:

said refusal herein of said Circuit Court of Appeals was and is in direct conflict with all and singular these Texas decisions, to-wit:

Alexander vs. Barfield, 6 Tex., 400;

Dull vs. Drake, 68 Tex., 205, and 4 S. W., 364; and

Cruse vs. O'Gwin, 106 S. W., 757, writ of error refused by Texas Supreme Court.

FOURTH ASSIGNMENT OF ERROR

(Error No. 4 in your Petitioners' Motion for Rehearing)

The Circuit Court of Appeals erred herein in holding that under the Texas Probate Act of March 20, 1848, Samuel W. Fullerton as administrator pro tem. of estate of John Peter Schatzell, deceased, "had the power and authority to make a valid conveyance" of the land involved herein, because "the authority was vested in Fullerton by the order of the court directing that the sale be made" to Robert Mott: said ruling was and is erroneous because under that law the chief justice of Nueces County had no right or power to authorize a mere administrator pro tem. to sell and convey real estate belonging to the decedent. When properly construed, that probate law of March 20, 1848, by necessary implication and intendment provided that a valid sale of land belonging to the estate of a decedent, for the purpose of paying debts and expenses, could and should be made only by a regular or permanent administrator, or an executor, acting pursuant to express order of the County Court sitting in probate, authorizing such sale and conveyance of the land.

FIFTH ASSIGNMENT OF ERROR

(Error No. 5 in your Petitioners' Motion for Rehearing)

The Circuit Court of Appeals erred herein in upholding the validity of the deed executed and delivered

to Robert Mott by Samuel W. Fullerton as administrator pro tem. of the estate of John Peter Schatzell, deceased, since no right or power of sale was given to Fullerton as said administrator pro tem. in the order of April 28, 1856, appointing him such administrator pro tem. of the Schatzell estate and since the chief justice of Nueces County under the Probate Act of March 20, 1848, had no right or jurisdiction thereafter to increase or enlarge the rights and powers of said administrator pro tem.

SIXTH ASSIGNMENT OF ERROR

(Error No. 6 in your Petitioners' Motion for Rehearing)

The Circuit Court of Appeals erred herein in holding, in substance and in effect, that under the Probate Act of March 20, 1848, the chief justice of Nueces County, Texas, had the right and power, at all times between the date upon which the administration proceedings were begun upon the estate of John Peter Schatzell, deceased, and March 1, 1860, date of attempted conveyance to Robert Mott, to authorize and empower an administrator pro tempore of said estate to sell and convey land belonging to said estate: in other words, that said chief justice was empowered by law to authorize a mere administrator pro tem. at any time to do and perform every act which might or could have been performed, under appropriate order of court, by a permanent administrator of the estate.

SEVENTH ASSIGNMENT OR ERROR

(Error No. 10 in your Petitioners' Motion for Rehearing)

The Circuit Court of Appeals erred herein in these respects, to-wit: (a) In failing to follow and apply herein the principles of law announced by the Supreme Court of the United States in Erie Railroad Company vs. Tompkins, 304 U. S. 64; and (b) in failing to follow and apply herein the principles of law announced by the Supreme

Court of the United States in these several decisions, to-wit: West vs. American Telephone & Telegraph Co., Six Companies of California vs. Joint Highway District No. 13 and Fidelity Union Trust Co. vs. Field, all decided on December 9, 1940, and also, Stoner vs. New York Life Insurance Co., decided on December 23, 1940.

BRIEF OF THE ARGUMENT

It is believed that in the foregoing petition for writ of certiorari and in this supporting brief this proposition of law is sufficiently established, to-wit:

That the County Court of Nueces County, Texas, sitting in probate, was wholly without power on and prior to March 1, 1860, (date of attempted conveyance to Mott) to authorize Samuel W. Fullerton as administrator pro tem. of the estate of John Peter Schatzell, deceased, to sell and convey to Robert Mott the land involved herein.

Without repetition, we here adopt as a part of this argument the undisputed record facts stated on pages 2, 5, 8 and 17 hereof.

The precise question now under consideration has, we believe, been decided by Texas appellate courts in a manner directly contrary to that held by the Circuit Court of Appeals herein.

The facts involved in Alexander vs. Barfield, 6 Texas., 400, occurred prior to February, 1845, in which year the suit was instituted. In 1847 the death of the plaintiff was suggested but no new party plaintiff was made. By duly recorded order of date September 4, 1850, the chief justice of Shelby County, Texas, appointed Charles H. Alexander temporary administrator of estate, said order stating: "And he is hereby empowered to transact all business as administrator of said estate until one may be appointed in our court of law." Said order

was duly signed and attested. The temporary administrator sought to prosecute the pending suit. "The defendants objected to the authority so conferred on Alexander and to his being made a party: the objection was sustained and an order made that the suit should be dismissed, but no judgment to that effect was entered. The appeal was taken by C. H. Alexander," the temporary administrator.

In that case Supreme Court of Texas held as follows: (1) That as there was no judgment in the court below from which an appeal would lie, the appeal should be dismissed; and (2) "It will be seen, by comparing the evidence of the appointment of C. H. Alexander as recited with the article cited from the Digest, under which it is assumed that they were issued by the chief justice, that the requisitions of the law have not been regarded in scarcely a single particular. Instead of giving the limited powers for the particular occasion, they give general and full powers, without any reference to being made a party to the suit, which was the only ground on which, in this case, the chief justice had any authority to act. **The court below could not regard a pro tem. appointment of administrators as of any validity, and could only treat the same as a nullity."** (Bold Face ours)

The "article cited from the Digest," namely: Article 1136, was identical with Section 27 of Probate Act of March 20, 1848, which the court quoted in that opinion and which is set out on page 9 hereof.

The order of September 4, 1850, appointing a temporary administrator, was VOID because it attempted to give "general and full powers" and not "limited powers for the special occasion" to the temporary administrator.

In that case, at outset of opinion, the court said:

"There was no judgment entered by the court below, and on this ground we might dismiss the appeal without inquiring into the correctness of the order of the court to dismiss the case. But, as the question was raised in the court below and has been presented in this court, it is not believed to be improper to decide it now, **as it may be important in practice."** (Bold Face ours)

Any suggestion that the doctrine of obiter dictum applies to the holding therein that the chief justice of Shelby County had no power to authorize the temporary administrator "to transact all business as administrator of said estate until one may be appointed in our court of law" is sufficiently answered by this quotation from United States of America vs. Title Insurance Trust Company, 265 U. S., 472, 486, to-wit: "Where there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, 'the ruling on neither is obiter, but each is the judgment of the court, and of equal validity with the other.' "

Alexander vs. Barfield, supra, has never been overruled or even limited or criticised in any later Texas case.

In Dull vs. Drake, 68 Tex., 205, land was sold by a temporary administrator pursuant to order of court, report of sale by temporary administrator and its confirmation by the court. **The action was one in trespass to try title.** When the deed from the temporary administrator was offered in evidence, it was excluded by the court and the assignments of error on appeal related solely to its rejection. The Supreme Court of Texas specifically upheld that action of the trial court and sustained **the collateral attack** upon the proceedings had in the probate court: in other words, there the attempted sale of land made by a temporary administrator, although supported by express court orders, was held ut-

terly void for want of power on the part of the probate court to authorize such sale.

The only difference between that case and the instant case is this, to-wit: there the proceedings occured soon after the appointment and qualification of the temporary administrator, while here precisely like proceedings were had several years after the appointment and qualification of Samuel W. Fullerton as administrator pro tem. of estate of Schatzell, deceased.

Whatever may be argued with respect to the reasoning used in that opinion, there can be and is no escape whatever from this fundamental proposition, towit: there the Texas Supreme Court held, **on collateral attack,** that the probate court was without power to authorize a temporary administrator to sell and convey land. The reasons given by the court for the conclusion thus reached are unimportant.

Cruse vs. O'Gwin, 106 S. W., 757 (writ of error refused by Texas Supreme Court) was also an action of trespass to try title to land.

At the trial below the appellants offered in evidence a deed to the land executed and delivered in 1841 by a temporary administrator, acting pursuant to express orders of court directing such sale by him. The trial court held such deed void and rejected it as evidence.

Among other things the appellate court there said:

"The land in controversy was granted to Robert Lucas by the colonists in 1835, and appellees claim the land as his heirs, while appellants claim it through a deed made by John Lucas, (temporary) administrator of the estate of Robert Lucas, to David N. Evans, in 1841. That deed was held to be null and void by the trial judge and rejected, and the result of this appeal is dependent upon the propriety of that rejection."

Said sale to Evans was made by the temporary administrator pursuant to express orders of the probate court. One objection to said deed was that the probate court was without power to authorize a temporary administrator to sell and convey land. Discussing that and other questions involved, the court said: "If there is sufficient evidence to indicate that there was no order of sale by **the permanent administrator,** and if the circumstances are of such a nature as to preclude a presumption of the existence of such, **there is no necessity for any other reason for the invalidity of the deed to be given.** *** Temporary administration is permitted only because the exigency requires some one to take charge of and protect the estate in the interim that necessarily arises between the death and a permanent administration, and **a strict construction is always given** to statutes relating to the powers and duties of a temporary administrator. **The power to sell land has not been given to him by law."** (Bold Face ours)

It should be especially observed that in Cruse vs. O'Gwin, just as in Dull vs. Drake, the attack on the attempted sale of land by the temporary administrator of an estate was **wholly collateral,** and not direct.

In this connection possibly it should be stated that in Texas the law has long been thoroughly settled that any order of a court of general jurisdiction may be attacked collaterally at any time, by any one, if and whenever it **affirmatively appears from the record in the cause** in which such order was made that said order was beyond the power or jurisdiction of the court to make, in any event or for any purpose.

In this case we make no attack upon the orders of County Court of Nueces County, Texas, attempting to authorize Fullerton as administrator pro tem. to sell and convey to Robert Mott the land involved herein, on the

ground that **the purposes** for which said sale was attempted to be made were not such as would support the sale: on the contrary, our "attack" is based solely upon the proposition that under the Act of March 20, 1848, said County Court had no power or jurisdiction whatsoever to authorize a mere administrator pro tem. of the estate of a decedent to sell and convey land for **any purpose whatsoever,** whether for payment of debts and expenses or otherwise, and that no valid sale of land belonging to the estate of the decedent could have been made under that law save and except by the executor or a permanent administrator, acting under proper orders of probate court.

Moreover, in making our "attack" on those orders of court we do not even remotely attempt to use any evidence **aliunde the record** in the probate cause involving the administration of the estate of Schatzell, deceased: on the contrary, the entire lack of power or jurisdiction on the part of County Court of Nueces County to authorize Fullerton as administrator pro tem to sell and convey land, appears affirmatively on the face of the record in that probate cause, from which it conclusively appears that the attempted sale to Mott was made by a mere administrator pro tem. acting under void orders of County Court, sitting in probate—same being thus void because not within the power of the court to make for **any purpose whatsoever.**

There was and is no legal difference between Sections 27 and 28 of the Act of March 20, 1848, re powers of an administrator pro tem. and Articles 3373 and 3378 of the present Statutes of Texas, each of which last mentioned articles has been a part of Texas probate law since 1876.

In Rose vs. Newman, 26 Texas., 131, 133, the action was one in trespass to try title to land. It was there held

that the County Court, sitting in probate, was without power to authorize a commissioner to sell and convey land. It was there said: "However plenary the powers of the County Court may be upon the subject of a partition of a deceased person's estate, when a sale of property becomes necessary to carry out the partition, the administrator must sell and execute his deed, to divest the estate of the title. The District Court might as well appoint a commissioner to levy upon and sell property in satisfaction of a judgment for money, while there was a sheriff, as for the County Court to appoint a commissioner to sell the land of an estate while there was an administrator. And if there were no administrator, from death or resignation, there could be no such action of the court until one was appointed. The estate is vested in the heirs, subject only to such disposition of it as may be necessary to be made by the administrator under orders of the court, to pay debts, to make partition and the like. It is, therefore, not a sale by any one who, through the authority of the County Court, in the administration of Lockhart's estate, could make a title."

A like ruling was made in Stafford vs. Harris, 17 S. W., 530, 532, wherein the Court said: "It has been held by our Supreme Court that a sale made by a commissioner appointed by the County Court in such case is void. Rose vs. Newman, 26 Texas, 132. While the County Court, in the administration of estates, is a court of general jurisdiction, and, having jurisdiction of the subject matter, every presumption is indulged in favor of the rightful exercise of its jurisdiction, still, when an order shows on its face the entire want of jurisdiction to make the same, it must be held invalid, and may be impeached in a collateral proceeding. The report of sale was of the sale of the land as made by a person who was unauthorized to make it. It was of a void sale. The order of confirmation undertakes to confirm a sale which

appears from the order itself to be a void sale. A purchaser looking to the order of confirmation would be informed that it was made by a person who was unauthorized by law to make it, and consequently of its nullity. It follows that there was not a valid decree of confirmation in the proceedings to make the sale for partition sufficient to protect J. W. Harris in his purchase of the land."

No substantial legal difference can be suggested between "a commissioner" to sell land belonging to the estate of a decedent and "an administrator pro tem.", asserting such right of sale.

The "limited powers" mentioned in Sections 27 and 28 of Act of March 20, 1848, necessarily mean the very opposite of "full powers": and in order to ascertain the meaning of the words "full powers" we must turn to said Probate Act of March 20, 1848, and to those principles of the common law not in conflict with its provisions.

Neither said Act nor the common law authorized the chief justice or the County Court of Nueces County to confer "full powers" on a mere administrator pro tem.

Under the opinion of the Circuit Court of Appeals herein the chief justice of Nueces County had the power to confer on Fullerton as administrator pro tem. not merely "limited powers" but "full powers", "unlimited powers", powers which could not be exercised at all even by a regular administrator or executor in the absence of express statute giving such powers to the court, by a radical modification of the common law on that subject.

It is submitted that the County Court of Nueces County had no power to authorize Fullerton as administrator pro tem. to perform any act, such as the sale of

land, which at common law could not have been performed by a temporary administrator or administrator pendente lite: this, (1) because said Act of March 20, 1848, granted no such right or power to the chief justice or to the court as such and (2) because section 135 of that Act applied common law principles to all acts and matters not specifically covered and provided for in the Act itself.

Ever since January 20, 1840, Texas has been a common law state. (See: 9 Texas Jurisprudence, page 306, Section 8) Hence, the inclusion in said Probate Act of March 20, 1848, of Section 135, making the common law of England a part of that Act except as in said Act otherwise provided, was really unnecessary and surplusage, and such inclusion therein merely emphasizes the proposition that the Legislature of Texas intended that neither executors or administrators nor administrators pro tem. should have or exercise power or authority not therein expressly granted or granted by the principles of the common law, and especially that neither the chief justice nor the County Court, sitting in probate, should have power or authority to grant to executors or administrators, or administrators pro tem., power and authority not specifically provided for in that Act, unless such power or authority came within the principles of common law as enforced and applied in Texas on and after January 20, 1840.

"At common law the administrator had no duty with respect to the realty, since it was not subject to the debts of the decedent" (13 Texas Jurisprudence, page 749).

Upon diligent search, we have found no case in the United States wherein a temporary administrator or administrator pro tem. or administrator pendente lite was held to have the power to sell and convey land, or where a sale of land made by such administrator pro

tem. or pendente lite was held valid, except where the power was given by express statute, which prescribed in detail how such power should be exercised.

"The duties of special or temporary administrators under modern practice are generally to collect and preserve the property and to hand over the assets to the general representative when appointed or qualified, and beyond this their powers do not extend, being strictly limited to those prescribed by statute." (24 Corpus Juris, 1180)

"In the absence of statutory authority, special administrators have no power to allow or reject claims against the estate, nor have they any authority to pay debts or to sell property for their payment." (24 Corpus Juris, 1181, 1182)

It should be particularly observed that under said Probate Act of March 20, 1848 (and the same is true under present probate statutes of Texas), an administrator pro tem. or a temporary administrator had, and could have, absolutely **no statutory powers** whatsoever. That Act contains nothing re the powers or authority of an administrator pro tem. other than as set out in Sections 27 and 28 thereof. Each of those sections merely authorizes the chief justice to grant to an administrator pro tem. "Such **limited powers** as the circumstances of the case may require."

In other words, in Texas it has been the law since March 20, 1848, that an administrator pro tem. is **without any statutory power whatsoever:** his every act must find support in his order of appointment defining his "limited powers".

In its opinion herein the Circuit Court of Appeals drew no distinction whatever between the "full powers" granted to executors and administrators by the Act of

March 20, 1848, and the "limited powers" such as might be conferred upon a mere administrator pro tem.

Certainly, the power to sell and convey land belonging to the estate of a decedent is "a full power", the very highest type of power, the greatest power which can possibly be exercised by an administrator or a court.

Bearing in mind that Texas adopted the common law of England in 1840, that such "common law" has ever since then been an integral part of Texas laws, that at common law no title to land belonging to a decedent ever vested in, or could be sold by, even a regular or permanent executor or administrator, and further that Section 135 of said Probate Act of March 20, 1848, expressly provided that "the rights, powers and duties of executors and administrators shall be governed by the principles of the common law, where the same does not conflict with the provisions of this Act", and, finally, that said Act of March 20, 1848, conferred no powers whatsoever, either "full" or "limited" upon administrators pro tem., it seems to follow, as night follows the day, that County Court of Nueces County had no power, when originally appointing Fullerton administrator pro tem. of Schatzell's estate, to empower him as such administrator pro tem, to exercise any authority which could not be exercised by a temporary administrator under principles of the common law of England, such as the sale of land.

The power which County Court of Nueces County attempted to confer upon Fullerton as administrator pro tem. was assuredly as "unlimited" and as "full" as can possibly be imagined: that attempted power was neither a "statutory power" nor a power granted or permitted by the common law of England.

No Texas court has ever held that the County Court, sitting in probate, had or has jurisdiction or power to

authorize a mere temporary administrator or administrator pro tem. to sell and convey land belonging to the estate committed to his charge—this, whether for the purpose of paying debts, expenses of administration, etc. or otherwise.

Respondents herein are represented by as thoroughly competent, able and diligent lawyers as any in Texas: yet, notwithstanding their ability, zeal, diligence and learning they have not found nor cited in either of the lower courts any Texas case holding that a Texas probate court has the power or jurisdiction to authorize a temporary administrator or administrator pro tem. to sell and convey land for any purpose or under any conditions whatsoever.

The simple truth is that **there is no such Texas case.**

In its opinion herein Circuit Court of Appeals has construed Sections 27 and 28 of Probate Act of March 20, 1848, precisely as if each section had used the words "with such UNLIMITED powers as the circumstances of the case require". In its interpretation of those sections said court has, we think, failed to give proper weight to the fact that in Section 28 the "limited powers" which the chief justice could grant to the administrator pro tem. were in the sharpest possible contrast with the "full powers" which that Act itself granted to executors and administrators.

When considering the several Texas statutes herein mentioned with respect to the powers of an administrator pro tem., and of the court appointing him, there should be applied the well established rule of interpretation that the expression of one thing is the exclusion of all other things, and that when a statute limits or provides that a particular thing shall be done in a particu-

lar mode, it by necessary implication negatives any other mode.

In Botany Mills vs. United States, 278 U. S., 282, the court said:

"When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode".

The Act of March 20, 1848, expressly limited the allowance or rejection of claims against the estate of a decedent and the right to sell land for payment of debts and expenses of administration to "executors and administrators". Especially, that very comprehensive Act was silent as to any allowance or rejection of claims, or any sale of properties, by an administrator pro tem.

In Birdwell vs. Kaufman, 25 Tex., 189, the Supreme Court of Texas said:

"The subsequent Act of 1848, concerning the settlement of estates, provides that 'every claim for money against a testator or intestate shall be presented to the executor or administrator within twelve months after the original grant of letters testamentary or of administration; or payment thereof shall be postponed', etc.; also, 'that no executor or administrator shall allow any claim for money against the testator or intestate', unless such claim be duly verified."

"When it is considered that the Act of 1848 was evidently designed to afford a system of rules for the settlement of the estates of deceased persons complete within itself, and to comprise the only rules which should govern in their settlement, it seems difficult to conclude that a claim for money against estates could be established so as to entitle it to be paid through the court's administration in any mode other than that which the statute prescribes".

In Ragsdale vs. Prather, 132 S. W. (2d), 625 (writ of error refused by Texas Supreme Court) it was said: "It is basic and fundamental that in a proceeding for the appointment of an (permanent) administrator neither the probate court nor the District Court, exercising appellate jurisdiction, can finally pass upon the validity or invalidity of claims asserted by or against the estate of the deceased"—in other words, under Texas probate laws only a qualified permanent administrator has the power to allow or reject claims: that power is not given to temporary administrators or an administrator pro tem. such as was Fullerton.

In the case last cited it was also said: "The appointment of an (permanent) administrator was essential to the proper protection of the asserted rights of both appellee and appellant. Appellant suggests that if this court deem the appointment of an administrator necessary, that we limit his authority. **To limit the authority of administrators is beyond the jurisdiction of the court. The law fixes his duty and powers."** (Boldface ours)

A Texas probate court has no power either to limit the authority of a permanent administrator or to confer upon an administrator pro tem any powers other than such "limited powers" as may be stated in order of appointment, not "full powers" or "unlimited powers".

A reading of the Texas statutes mentioned on pages 9 and 10 of foregoing petition will disclose that the powers of an administrator pro tem. appointed under those laws were only those ordinarily exercised or possessed by temporary administrators of estates and were intended merely for the temporary protection of the estate pending appointment and qualification of an executor or administrator.

The appointment of an administrator pro tem. under

Section 27 of Act of March 20, 1848, automatically "ceased to be of force on the first day of the term of the court next after the date" of such appointment, unless continued in force by special order entered in minutes of court, and further "in no case" did such appointment continue in force beyond the first day of the second term of court next after date of appointment of administrator pro tem.

However, under Section 28 an administrator pro tem. appointed because of a contest relative to the probate of a will or to the granting of letters of administration was continued in force until termination of said contest and until "the appointment of an executor or administrator with full powers". Said Section 28 contemplated the appointment of such administrator pro tem. whether the contest should be in the County Court or "in any other court on appeal": also, said Section 28 made it "the duty" of the chief justice to appoint an administrator pro tem. in case of a contest of probate of a will, whether in County Court or any other court on appeal. Such appointment in case of a contest was not optional but mandatory.

Section 27 provided that the regular or permanent executor or administrator should have **"full powers"** but that the administrator pro tempore should have only "such **limited powers** as the circumstances of the case may require", and further provided that the order of appointment "shall define the powers conferred" on an administrator pro tem.

Under the Probate Act of March 20, 1848, every executor or administrator had "full powers", whereas every administrator pro tem. had merely "such limited power as the circumstances of the case required", and such as should be defined in order of appointment.

As in Section 27, Section 28 provided that the administrator pro tem. appointed thereunder should have only "such **limited powers** as the circumstances of the case requires," pending termination of contest and appointment of executor or administrator "with **full** powers".

The Texas Probate Act of March 20, 1848, was very comprehensive and wholly free from ambiguity, and evidently prepared with much care by able lawyers. Its express provisions exclude the thought that the County Court, sitting in probate, could, when appointing an administrator pro tem., under either Section 27 or Section 28, grant to such administrator pro tem. **all** of the powers granted by that Act to "executors or administrators", including the right to allow or reject claims against the estate and, especially, the right to sell and convey land belonging to the estate of a decedent.

In the alternative, only, if that Act of March 20, 1848, be examined in the light of the usual rule of interpretation that the expression of one thing in a statute should be construed as the exclusion of all other things, and/or in the light of the rule of interpretation of statutes based upon "associated words", then and in any event by necessary implication that law, construed as a whole, did not confer on the County Court the right or power to authorize a mere administrator pro tem. to sell and convey land belonging to the estate of a decedent.

Finally, and still in the alternative, only, as herein shown, that Act of March 20, 1848, has been so construed by Texas courts as to deny to the County Court sitting in probate the right or power to authorize a mere temporary administrator or administrator pro tem. to sell and convey land belonging to the estate of a decedent; and that interpretation by Texas courts of that law is binding upon all other courts, even if such inter-

pretation may be different from the interpretation which this court might or would place on said Act as an original proposition.

The basic question involved herein, to-wit: the right or power vel non of County Court of Nueces County to authorize Fullerton as administrator pro tem. of Schatzell estate to sell and convey the land involved herein, necessarily depends upon the proper interpretation of said Probate Act of March 20, 1848: and that in turn depends largely upon the inclusion therein of Section No. 135 reading thus: "That the rights, powers and duties of executors and administrators shall be governed by the principles of the common law, where the same does not conflict with the provisions of this Act".

As early as 1846, in Thompson vs. Duncan, 1 Tex., 485, the Supreme Court of Texas said:

"The rule of the common law is that the personalty shall go to the legal represenative, and the realty shall descend to the heir, on the death of his ancestor. The heir takes the land subject to a particular grade or dignity of debts, but the personal representative has nothing to do with it. By statute, some modifications have been made, but none of them, is it believed, makes lands assets in the hands of the administrator. In some of the states of the Union the common law rule is in force, and in others it has been so qualified as to make the lands contingently a fund in the hands of the administrator to be sold by him, and the proceeds applied to the payment of debts of every kind, where the personalty is insufficient; in such cases it would seem he could sue for land, which might be necessary to pay debts, if it was held against the better title of his intestate. The difference in the rule of the common law between land and personal property never had existence in this country".

That case was decided some time prior to March 20, 1848, and upon facts which arose in or prior to 1842.

"At the common law it was held that real property descended directly to the heirs of a decedent, and with that the executor or administrator had no concern, the management, settlement, or administration of the estates of deceased persons relating primarily and fundamentally to personal property alone". (23 Corpus Juris, page 998, Section 8) See, also: 23 Corpus Juris, page 1136, Section 328, note 87, citing cases from many state courts. Also, see: 24 Corpus Juris, page 459, Section 1261.

The inclusion in that Act of March 20, 1848, of said Section 135 shows that the Legislature of Texas preferred the principles of the common law, as same then existed in England, with respect to the estates of decedents, to the principles of the civil law as same had until then existed in Texas, as to such estates.

Said Section 135 greatly emphazies the strictness with which Texas courts have always construed those parts of said Act of March 20, 1848, relating to administrators pro tem, especially where land is involved.

It is our understanding that under the common law of England an administrator pro tem. (or, pendente lite) had nothing whatever to do with land owned by the decedent but his powers were limited wholly to personal and mixed properties.

"In the absence of anything in the statute clearly indicating a contrary intent, where the same word or phrase is used in different parts of a statute, it will be presumed to be used in the same sense throughout, and where its meaning in one instance is clear, this meaning will be attached to it elsewhere". (59 Corpus Juris, page 1003, notes 82 and 83, citing cases, including: Pampanga Sugar Mills vs. Trinidad, 279 U. S. 211;

Feder vs. Goetz, 264 Fed., 619; and Lewelyn vs. Harbison, 31 Fed. (2d), 740, certiorari denied.)

Applying that rule of interpretation to the expression "executor or administrator" and to the word "administrator", as so frequently used in said Probate Act of March 20, 1848, the conclusion seems irresistible that the word "administrator" wherever used in that law was intended to mean and did mean "a regular administrator", "a permanent administrator", as contra-distinguished from the "administrator pro tem." specially mentioned in Sections 27, 28, 29 and 116 of that law—those four sections being the only ones in which any mention is made of administrators pro tem.

That all parts of said Probate Act of March 20, 1848, should properly be construed in the light of Section 135 thereof, adopting the principles of the common law of England then in force, is illustrated by these two late Texas decisions, to-wit: Miller vs. Letzerich, 121 Tex., 248; and Powell vs. City of Amarillo, 57 S. W. (2d), 233 and 93 S. W. (2d), 144.

Unquestionably, on March 20, 1848, in England a mere temporary administrator or administrator pendente lite could not be authorized by the court to sell land belonging to the estate of his intestaate.

In construing said Act of March 20, 1848, more especially with regard to the power vel non of the County Court to authorize a mere temporary administrator pro tem. to sell and convey land belonging to the estate, due regard should be given to the doctrine of "associated words", as illustrated by Russell Motor Car Company vs. United States, 261 U. S., 514 and 59 Corpus Juris, page 979, Section 579.

Repeatedly in that Act of March 20, 1848, we find the words "executor or administrator". Among those very

numerous sections thus using said associated words are those directly relating to presentation of claims against the estate, the allowance or rejection thereof, sales of property which may be made only for the purpose of paying debts and expenses of administration, etc. Section 67 thereof provided thus: "That when a sale of property is ordered under the provisions of this Act, it shall be the duty of the executor or administrator to make such sale or cause it to be made in obedience to the order, at the earliest period; and when such sale has been made, it shall be the duty of the executor or administrator to return to the court that ordered the sale an account thereof", such account to be "sworn to and subscribed by such executor or administrator before some officer authorized to administer oaths"; also, that if the court should be satisfied with such sworn report, the court should confirm such sale and order "a conveyance to be made to the purchaser of either land or slaves by the executor or administrator". Also, that following decree of confirmation and upon compliance by purchaser with terms of sale, "the executor or administrator shall execute and deliver to him a conveyance of the property so sold, if it were either land or slaves."

Section 72 of the Act provided thus: "That whenever an executor or administrator sells property of the estate he represents, on a credit **** he shall take the note of the purchaser for the amount of his purchase with good personal security; and if land or slaves have been sold, he shall also take a mortgage upon the property sold, to secure the payment of the purchase money".

Doubtless it would have startled the able lawyers who wrote that carefully prepared Probate Law if they had been told that, notwithstanding its clarity, it would years later be asserted that the County Court, sitting in probate, had the right or power to confer on mere

administrators pro tem., appointed under either Section 27 or Section 28, not merely "limited powers" but ALL OF THE POWERS AND AUTHORITY, "the full powers" therein mentioned, as to be exercised only by "executors or administrators".

If the decision of the lower courts herein was and is sound in law, then it necessarily follows that the county judge of every one of the 254 counties in Texas has an absolute right to decide in every probate case filed in his court, whether he will have the estate administered by a "permanent" administrator, in accordance with Texas probate laws, or dispense entirely with a regular administration of the estate and "do a turnkey job" by and through a mere temporary administrator, thereby dispensing effectually and entirely with all of the numerous safeguards which our Texas probate laws have provided for the protection of creditors, heirs at law, devisees, etc.

Under the decision herein by the Circuit Court of Appeals every Texas county judge may at any time, at his own discretion, appoint a temporary administrator and confer upon him any and all powers and authority, including the right to sell real estate, which to the judge may seem right and proper; and thereafter, from time to time, and as often as he may deem necessary, such judge can enlarge the powers of such temporary administrator, and thus completely administer and distribute the entire estate without even an attempt at compliance with requirements of probate laws of Texas.

If under the Act of March 20, 1848, the chief justice had the power to enlarge the authority of the temporary administrator at any time so as to include the right to sell and convey land, then undoubtedly such chief justice had such right and power when making the original appointment of such administrator pro tem.

Under that Act, either that power or jurisdiction existed initially and continuously thereafter until close of administration or same never existed at all.

We plant ourselves squarely upon the basic proposition that the chief justice of Nueces County, Texas, had absolutely no power, under the Probate Act of March 20, 1848, to authorize Fullerton as a mere administrator pro tem. to sell and convey the land involved herein: if that proposition be sound, then it is unimportant whether said Act did or did not require that the powers of the administrator pro tem. be set forth in his order of appointment or whether the necessary legal effect and interpretation of that Act was to nullify acts performed by the administrator pro tem. which were not expressly authorized in his order of appointment.

If the chief justice of Nueces County had no right or power to authorize Fullerton as a mere administrator pro tem. to sell and convey the land involved herein, then certainly he could not, and did not, create such power, contrary to the Act itself, by the simple device of including or "specifying" such power in his order attempting to authorize a sale of said land.

Nothing that the chief justice of Nueces County did, or left undone, could by any legal possibility clothe him with a power to perform any act not authorized, either expressly or by necessary implication, by the law itself.

After all, the vital question is, not what power or authority the chief justice of Nueces County specified in his order pursuant to which Fullerton as administrator pro tem. attempted to sell and convey to Mott, but what power or authority did the Act of March 20, 1848, authorize said chief justice to grant to Fullerton as an administrator pro tem.? If it was a power authorized by that Act, then the administrator pro tem was author-

ized to execute and deliver the deed to Mott, etc.: on the other hand, if that law did not so empower the chief justice to authorize said administrator pro tem, to sell and convey land, then the attempt of the chief justice to confer such authority on said administrator pro tem. was void for want of power or jurisdiction, regardless of recitals in the order or orders.

It may be assumed that the chief justice of Nueces County **thought** on March 1, 1860, that as a court he had the right and power under the Act of March 20, 1848, to authorize Fullerton as administrator pro tem. to sell and convey the land involved herein but, emphatically, his mere thought or belief to that effect did not itself authorize him to empower such sale of land by administrator pro tem. The existence vel non of such power necessarily depends upon the proper interpretation of the Act of March 20, 1848, and not upon the erroneous belief or assumption of such power.

It was and is a case of entire lack or want of power, and not merely a case of an erroneous exercise of an admitted power or jurisdiction.

In the Circuit Court of Appeals able counsel for respondents argued in substance that if, when attempting to authorize Fullerton as administrator pro tem, to sell and convey the land involved herein, the chief justice of Nueces County **thought,** that under the Act of March 20, 1848, he had the power to authorize such sale by a mere administrator pro tem., that would forever foreclose any inquiry with respect to the proper, legal interpretation of the Act itself, re sale of land owned by the decedent, and the chief justice himself was the sole judge of the powers conferred upon him by the Act of March 20, 1848.

The fallacy of that argument is too plain to require discussion.

No judge is the sole judge of his own powers and jurisdiction: in every "government of law and not of men" all such questions must depend upon constitutional or statutory provisions, or on well established principles of the common law.

In the court below able counsel for respondents also argued in substance that Mott was not charged with knowledge of the limited powers conferred on Fullerton in the original order of date April 28, 1856, appointing him administrator pro tem of estate: however, that question is purely academic in view of the undisputed, record proof that the application for crder of sale, the order of sale, the report of sale, and the confirmation of sale, leading up to the deed from the administrator pro tem. to Mott, on their face showed that in said matters Fullerton was acting solely as an administrator pro tem. of the Schatzell estate. Thereby Mott was put upon notice that he was dealing with a mere administrator pro tem. and not with "a permanent administrator", acting under order of court.

When thus dealing with a mere administrator pro tem. Mott necessarily knew, as matter of law, that the probate court had no power, whether in original order of appointment of administrator pro tem. or in later orders, to empower Fullerton as a mere administrator pro tem. to sell and convey land, no such power having been conferred on the probate court by the Act of March 20, 1848, but directly to the contrary, at least by necessary implication.

In Cline vs. Niblo, 8 S. W. (2d), 633, the Supreme Court of Texas said:

"Irrespective of the character or dignity of the tribunal pronouncing the decision, whether of inferior, limited or superior general jurisdiction, **it must confine**

its determination within the authority it possesses under the law and the case. If the court is exercising special statutory powers, the measure of its authority is the statute itself and a judgement in excess thereof is null and void, and subject to collateral attack, **a rule which finds frequent application in the case of probate judgments".** (Boldface ours)

In Harrison vs. Barngrover, 72 S. W. (2d), 971 the court said:

"It has long been recognized in this state that probate courts have only such powers as are delegated to them by statute. St. Paul Sanitarium vs. Crim, 84 S. W., 1114 (writ of error denied); Marks vs. Hill, 46 Texas, 345; Smith vs. Paschal (Texas Commission of Appeals), 1 S. W. (2d), 1086; Cline vs. Niblo, 117 Texas, 474". Also the court there said: "For any court to act within its jurisdiction, in the sense that its judgment is immune from collateral attack, it must not only have jurisdiction of the parties and of the res or property to be dealt with, but it must also have **the power to enter the kind of order,** judgment or decree which is the subject of the attack", citing cases. (Boldface ours)

Our Texas Supreme Court refused application for writ of error in Harrison vs. Barngrover, thereby approving the opinion therein. This court denied petition for writ of certiorari. 294 U. S., 731.

The decision herein of the Circuit Court of Appeals conflicts, in principle, with Moyers vs. Carter, 61 S. W. (2d), 1027, writ of error denied by Supreme Court of Texas. In that case the probate court appointed Moyers temporary administrator with authority to make and file proofs of death and to collect proceeds of a certain life insurance policy payable to estate of a decedent. Moyers promptly qualified as temporary administrator, collected

proceeds of policy, paid claims for the last sickness, funeral and hospital expenses of the decedent, which claims were duly verified by claimants and were approved by the temporary administrator and were allowed by the probate judge as claims of the first class, aggregating $500.00. A creditor of the decedent presented to the temporary administrator its claim, duly verified, which the temporary administrator allowed as a claim of the third class and the probate judge so approved said claim. The temporary administrator applied net proceeds of policy, over and above the $500.00, in partial satisfaction of said secured claim of said creditor. **The probate court approved all these acts** of the temporary administrator and closed up the administration, decreeing that there was no necessity for permanent administration. Said payment by temporary administrator to said creditor was held by the appellate court to be void. There the court among other things said:

"This case, as presented both by pleadings and evidence, shows a clear necessity for an administration in the probate court in order to make the statutory allowances for an indigent surviving wife and minor child. The (probate) court correctly appointed a temporary administrator to collect and hold in its possession the proceeds of insurance policy. The probate court, when it permitted the temporary administrator to go beyond this power, and thereby to dissipate the entire estate during the temporary administration, acted in violation of the terms of Article 3379 of our probate laws, and hence the orders were void, as declared by such statute. Allar Company vs. Roeser (Texas Civil Appeals), 217 S. W., 442; Dull vs. Drake, 68 Texas, 205; Cruse vs. O'Gwin, 48 Texas Civil Appeals, 48; 106 S. W., 757; Dodge vs. Youngblood (Texas Commission of Appeals), 245 S. W., 225; Fenimore vs. Youngs, 119 Texas, 159".

The decision herein by the Circuit Court of Appeals conflicts, in principle, with the decision of Court of Civil Appeals of Texas in Barfield vs. Miller, 70 S. W. (2d), 632, in which case application for writ of error was dismissed by Texas Supreme Court.

The essence of that opinion is thus correctly stated in paragraph 10 of syllabus, to-wit: "Where probate court had directed appointment of temporary administratrix as permanent administratrix on executing bond and taking oath, but such person had not qualified as permanent administratrix when probate court ordered property sold to satisfy a judgment against the estate, proceedings for such sale held void, since there was no legal representative of estate at time".

Wholly aside from the conflict between the opinion of the Circuit Court of Appeals herein with applicable Texas statutes and decisions as hereinabove cited and discussed, said opinion is likewise in conflict with Texas cases, hereinafter cited, in this respect, to-wit:

As elsewhere herein stated, Samuel W. Fullerton was appointed administrator pro tempore of the Schatzell estate by order dated April 28, 1856, which provided as follows: "That Samuel W. Fullerton be and he is hereby named and appointed administrator pro tempore of the aforesaid estate of John P. Schatzell, deceased, during the pendency of the controversy in the case, whose duty it shall be to gather and take into possession all the assets, demands and evidences of debt or title belonging to said estate, with full power and authority to do and perform all legal acts, and take such proceedings as shall or may be necessary to maintain him in the possession and charge of said estate and property, real and personal, so as to preserve the same and prevent its removal or waste, until the further order or decree of this court". Said order fixed his bond as administrator pro

tem. in the sum of $184,126.64, which he promptly gave. (R., 502 and 503)

Fullerton was acting as administrator pro tempore of that estate under said appointment, and acting in no other capacity, when he applied to the court for an order to sell property belonging to the estate and when the court attempted to authorize him as administrator pro tempore to sell and convey to Mott. (R., 373 to and including 380)

It will be seen that in his original order of appointment Fullerton as administrator pro tempore was not authorized by the court either to pass upon claims against the estate of the decedent or to sell property of any kind belonging to the estate; his original duties were merely those ordinarily performed by an administrator pro tem.

That said court had no power after April 28, 1856, date of such original appointment, to enlarge or increase the powers of Fullerton as an administrator pro tem. so as to authorize him to allow claims or to sell and convey land belonging to said estate, is supported by these Texas cases, to-wit:

Dull vs. Drake, 68 Texas, 205;
Willis vs. Pinkard, 52 S. W., 626;
Stewart vs. Poinbeouf, 201 S. W. 1025;
Lemp Brewing Co. vs. LaRose, 50 S. W., 460;
Allar Co. vs. Roeser, 217 S. W., 442;
Tolivar vs. Lombardo, 88 S. W. (2d), 733;
Dodge vs. Youngblood (Texas Commission of Appeals), 245 S. W. 225; and
Ramirez vs. Bank, 82 S. W. (2d), 523.

In Dull vs. Drake, supra, the court said:

"Our probate law does not contemplate that a temporary administrator shall have any powers except such as are expressly granted to him by the county judge **at the**

date of his appointment".

In Willis vs. Pinkard, supra, the court among other things said:

"The statute authorizing the appointment of temporary administrators prescribes the manner of their appointment, and provides that 'they shall have and exercise only such rights and powers with regard to the estate ***** as are specifically and clearly expressed in the order of the court appointing them, and any acts performed by them as such administrators that are not so expressly authorized shall be void.' Revised Statutes, Article 1935. Our courts have uniformly given this statute a strict construction, not only because such construction is authorized by the very terms of the Act itself but because excellent reasons exist why the powers of a temporary administrator should not be extended beyond those clearly intended to be conferred by the court appointing him. The appointment may be made upon the court's own motion, without notice, and before the estate, and the condition of it, has been otherwise brought within the cognizance of the probate judge. No party at interest has the opportunity to protest, whatever objection might be urged to the character or capacity of the individual appointed. **** Nothing short of the emergency contemplated by the statutes would authorize the courts to appoint a temporary administrator in any case, and it cannot be successfully contended that the powers of a temporary administrator should be dangerously extended in the absence of all emergency".

In essence, said Article 1935 of Texas Revised Statutes (in force when Willis vs. Pinkard was decided) is the same as Section 27 of the Probate Act of March 20, 1848, set on page 9 hereof.

As already shown hereinabove, in Alexander vs.

Barfield, 6 Texas, 400, Texas Supreme Court held that the probate court was without power to authorize an administrator pro tem, appointed soon after the death of the intestate, to "transact all business as administrator of said estate until one may be appointed in our court of law."

Now, if, under Alexander vs. Barfield, the probate court had no power on April 28, 1856, to authorize Fullerton as administrator pro tem. to pass upon claims and to sell and convey land belonging to the estate, but if, as found by the Circuit Court of Appeals, that power did exist on November 2, 1859, it is interesting to speculate on just what date between those two dates the County Court of Nueces County first acquired and thereafter had the right and power to authorize such sale of land by Fullerton as administrator pro tem, for the purpose of paying claims against the estate theretofore allowed by him in his said capacity of administrator pro tem?

Obviously, the only possible legal answer is that there was never a time, under Texas Statutes and decisions, when the County Court of Nueces County, Texas, had the power to authorize Fullerton as administrator pro tem. either to allow claims against the estate or to sell land belonging to the estate in payment of any such allowed claim.

CONCLUSION

In conclusion, we respectfully insist that in its decision of this cause said Circuit Court of Appeals clearly and erroneously departed from the long settled rules of property of the State of Texas and that its holding that the deed to Mott from Fullerton as administrator pro tem of estate of Schatzell conveyed to Robert Mott the title to the land therein described is squarely in conflict with the Texas decisions cited and discussed in our peti-

tion for writ of certiorari and in the foregoing supporting brief, and that said decision herein is erroneous.

Wherefore your petitioners, first above named, respectfully pray that the Supreme Court of the United States will grant to them a writ of certiorari to said Honorable Circuit Court of Appeals for the Fifth District in said cause No. 9662, Frank A. Ash and Mary Zacharie Brock, et al. vs. Barnsdall Oil Company, et al., and that following the granting of such writ the Supreme Court of the United States will in all things vacate and reverse the judgment rendered in said cause by said Circuit Court of Appeals and grant to your petitioners any and all such relief, general and special, legal and equitable, as they may be entitled to receive upon the undisputed facts involved herein and the law applicable thereto.

As your petitioners will ever pray.

Respectfully submitted,

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SEP 2
CHARLES ELMORE

IN THE SUPREME COURT OF THE UNITED STATES

NO. 221, OCTOBER TERM, 1941

MARY ZACHARIE BROCK, ET AL.,
Petitioners,

VS.

BARNSDALL OIL COMPANY, ET AL.,
Respondents.

REPLY OF MARY ZACHARIE BROCK, ET AL., PETITIONERS, TO "REPLY OF J. O. PHILLIPS, ET AL., RESPONDENTS, TO PETITIONS FOR CERTIORARI" AND ALSO TO "REPLY OF BARNSDALL OIL COMPANY, ET AL. TO PETITIONS FOR WRIT OF CERTIORARI".

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With the hope that we may aid the Court in reaching a correct decision herein, upon the undisputed facts and the law applicable thereto, we respectfully show to the court as follows, to-wit:

It is true, as stated by counsel for respondents J. O. Phillips, et al., that Alexander vs. Barfield, 6 Texas, 400, "did not involve a sale (of land) by an administrator (pro tem) but (merely) the right of an administrator pro tem to sue where no such authority was conferred by the order appointing him". Obviously, the right or power of an administrator pro tem to prosecute a suit instituted by his intestate is a right or power of much less dignity or importance, much less "full",

than the right or power to sell land belonging to his intestate.

The essential distinction between land and all other forms of property has always been recognized and applied in and by the laws of Texas and the decisions of its courts construing and applying those laws. Indeed, we believe that such distinction between land and all other forms of property has been recognized and applied in practically all civilized states and nations, more especially in those states, like Texas, which have adopted the principles of the common law of England as applicable and controlling in the absence of repeal or modification by constitutional provision or by express statute.

In Dull vs. Drake, 68 Tex., 205, cited in our original brief herein, the court recognized that essential distinction in these words, to-wit: "land is a species of property that the law deems of so much importance that it must not be sold for any purpose, so long as there is anything else that can be disposed of with more advantage to the estate", etc.

In Alexander vs. Barfield the temporary administrator was attempting, not to sell land belonging to the estate of his intestate but to protect and preserve the estate by the further prosecution of an action instituted by his intestate and pending at the date of his death.

The order of court involved in Alexander vs. Barfield was as follows: "It is ordered by Robert Turner, chief justice of said county (Shelby County, Texas) that Charles H. Alexander be and he is hereby appointed temporary administrator of the estate of John M. Alexander; and he is hereby empowered to transact all business as administrator of said estate until one may be appointed in our court of law. Witness my hand this

4th day of September, 1850. (Signed) R. Turner, Chief Justice."

For further discussion of Barfield vs. Alexander see p. 24 of our original brief in this court.

Counsel for appellants in Dull vs. Drake, 68 Texas, 205, urged upon the court the proposition that the probate court of McMullen County, Texas, "being a court of general jurisdiction of matters within its cognizance, upon a collateral attack all presumptions will be indulged in favor of its orders, judgments and decrees; and when the court acts upon a subject matter within its jurisdiction, upon a collateral attack, its jurisdiction will be presumed to have attached in the particular case, unless the records clearly show affirmatively to the contrary", citing earlier Texas cases in support thereof. As more fully shown on page 26 of our original brief herein, that case was an action of trespass to try title to land and the attack made upon the deed executed and delivered by the temporary administrator was **purely collateral.** The same is true of Cruse vs. O'Gwin, 106 S. W., 757.

In Dull vs. Drake Chief Justice Willie among other things said: "The bill (of exceptions) further states that the appellants then offered in evidence a deed from J. L. Croom, Jr., administrator of the estate of Charles Coley, deceased, to W. A. Hill, for said land, and also the records of the probate court of McMullen County, showing application of John L. Croom, Jr. for letters of temporary administration on the estate of Charles H. Coley, deceased, and application to sell the land in controversy; also, order of court appointing Croom temporary administrator of said estate, and ordering sale of the land in controversy by said administrator; also, the report of the sale, **and its confirmation by the court.** Upon ob-

jection, the administrator's deed was ruled out by the court, and the assignments of error relate solely to its rejection". That action of the trial court was affirmed.

There the probate court granted the application of the temporary administrator for an order to sell land and thereafter the probate court confirmed the report of sale of land made by the temporary administrator.

The primary and basic proposition involved in that decision was simply this, to-wit: that the probate court of McMullen County was wholly without power or jurisdiction to authorize a mere temporary administrator to sell and convey land belonging to the estate.

The quotation from Cruse vs. O'Gwin on pages 5 and 6 of brief for respondents J. O. Phillips, et al., is misleading and incomplete, because torn loose from its immediate context. What the court there actually said was this, to-wit: "Even though there was no entry in the record books of the court tending to show that order of sale was issued to **THE PERMANENT ADMINISTRATOR,** or tending to show an approval of the sale made by him, still, if there was anything written on any paper filed in the case in the probate court that directly or indirectly indicated approval of the sale by the probate court, we would sustain its validity under the authority of decisions of the Supreme Court. Neill vs. Cody, 26 Texas, 286; Moody vs. Butler, 63 Texas, 210. But in this case there was no confirmation, nothing from which a confirmation can be inferred, and nothing done by the purchaser giving him the right to have the sale confirmed".

Comment on the foregoing is unnecessary. Our emphasis on the words "the permanent administrator" is entirely sufficient.

In Neill vs. Cody, 26 Texas, 286, the facts briefly

were these: a regular or permanent administrator, not a mere administrator pro tem, applied to the probate court for an order to sell certain land; said order was granted and later the administrator reported a sale of the land but it did not appear that there ever was any order of court approving or confirming said report of sale and there was no evidence that the sale was completed by a compliance with the terms of sale by the purchaser. It was held that a confirmation of the sale, or something from which the confirmation might be inferred, or, at least, something done by the purchaser entitling him to have the sale confirmed, was necessary to be shown in order to enable him to claim title under it.

The case did not involve any act of a temporary administrator or administrator pro tem.

The sale of land involved in Moody vs. Butler, 63 Texas, 210, was made by an executor, and not by a temporary administrator or administrator pro tem.

As is apparent on its face, Article 1176, Hartley's Laws of Texas, page 373 (Sec. 67 of Probate Act of March 20, 1848) related solely to sales made by "the executor or administrator"—i. e., made by a regular or permanent administrator and not by a mere administrator pro tem.

In said Article 1176 the associated words "executor or administrator" were used five separate times; while the words "temporary administrator" or "administrator pro tem" were not used at all therein.

Seefeld vs. Duffer, 179 Fed., 214, cited on page 8 of brief for respondents J. O. Phillips, et al. has not the slightest relevancy or value, simply because the sale of land there involved was made by a regular or permanent administrator, and no act of a temporary administrator was even remotely considered.

On page 2 of brief for respondents Barnsdall Oil Company, et al., it is stated that "there was not in 1860, when the sale in question was made, nor at any other time, any statute **prohibiting** a temporary administrator, when authorized by the court, from making a sale of real estate to pay debts of the estate". That argument is fallacious because it **assumes** that in the absence of an express prohibition the probate court had the power "to authorize" a temporary administrator to sell land to pay debts of an estate. That is the very question at issue herein.

It is undeniable, and able opposing counsel in their respective briefs concede, that the Probate Act of March 20, 1848, in force during 1860, did not expressly authorize the probate court to grant to a temporary administrator or administrator pro tem the power to sell land, for whatsoever purpose.

As more fully developed in our original brief herein, administrators pro tem are mentioned in only Sections 27, 28, 29 and 116 of Probate Act of March 20, 1848.

Said Section 27 provided for the appointment of administrators pro tem, "with such limited powers as the circumstances of the case may require", in limine and prior to probate of will or appointment of a permanent or regular administrator; while said Section 28 provided for the appointment of a like administrator pro tem, "with such limited powers as the circumstance of the case may require", "pending any contest relative to the probate of a will or the granting of letters of administration".

Said section 29 related wholly to the oath and bond of the administrator pro tem; while said Section 116 related entirely to what should be done whenever an administrator pro tem "shall have been appointed and

an executor shall afterwards be qualified or an administrator appointed". **Said Section 28 alone** related to or mentioned the **powers** to be exercised by an administrator pro tem appointed pursuant thereto.

Said Section 28 on its face draws an absolutely clear distinction between the "limited powers" which the probate court could confer upon administrators pro tem and those "full powers" which the Probate Act of March 20, 1848, expressly conferred upon "executors and administrators".

Undeniably, among the "full powers" granted by that Act to every executor and every administrator were these, to-wit: (a) the power to investigate, and then allow or reject, claims against the estate and (b) the power to sell land belonging to the estate, under proper order of court, to pay just debts when allowed and approved by the court.

On page 8 of brief for respondents J. O. Phillips, et al. it is stated broadly, "under our statutes, any power that could be conferred on a regular administrator might be conferred on an administrator pro tem". The cases cited to support that bald assertion do not do so.

Callahan vs. Houston, 78 Texas, 494, merely held that the probate court had the power to authorize a temporary administrator to prosecute an action already begun by the decedent.

Robinson vs. Montel, 11 Texas, 149 is interesting, historically, because it involved an alleged sale of a negro slave, but the case does not, even remotely, support the proposition that "under our statutes, any power that could be conferred on a regular administrator might be conferred on an administrator pro tem".

In Ellis vs. Holcombe, 69 S. W. (2d), 449, 454, it was said: "The general rule of construction of statutes is thus stated in Sutherland on Statutory Construction, page 412: 'Where authority is given to do a particular thing and the mode of doing it is prescribed, it is limited to be done in that mode; all other modes are excluded. Such affirmative legislation and any other which introduces a new rule imply a negative.' This rule of construction is based upon the legal maxim that the expression of one thing is exclusive of another".

To like effect see these cases:

Paso Robles Co. vs. Commissioner of Internal Revenue, 33 Fed. (2d), 653;

Martin vs. Commissioner of Internal Revenue, 61 Fed. (2d), 942;

Anderson vs. Madsen Investment Co., 76 Fed. (2d), 768;

City of Corpus Christi vs. McMurray, 90 S. W. (2d), 868;

Milhollon vs. School District (Comm. of App.), 231 S. W., 332; 39 Texas Jurisprudence, p. 188, Sec. 100; and 59 C. J., p. 984.

On page 2 of reply brief of Barnsdall Oil Company, et al. it is stated that "the Probate Act of 1848, by necessary implication, and by express legislative enactment, authorized the court to confer upon administrators pro tempore and especially upon administrators pendente lite the power to sell real estate", to which we reply: If there was such "express legislative enactment", why should counsel refer to "necessary implication" of alleged authority?

In fact, said Probate Act did not, either expressly

or by "necessary implication", authorize the probate court to empower an administrator pro tem to sell real estate; significantly, counsel did not cite or quote any such alleged statutory power, either express or implied.

Again, we have found nothing in that Probate Act of 1848 relating to "administrators pendente lite", eo nomine.

Said Act mentions only "administrators pro tem", executors and administrators.

It is there also argued by opposing counsel that under Sections 44 and 45 of said Probate Act (see said sections on page 2 of appendix to said reply brief) it became the imperative duty of the probate court to provide the money necessary for the support and maintenance of the widow and minor children immediately, at the first term of the court after the granting of letters, and also to provide funds on certain contingencies in lieu of exempt property. But, on page 4 of said brief it is admitted that "In the case at bar **the land was not sold** to pay any of the allowances above referred to"—i. e., for support and maintenance of widow and minor children and/or in lieu of exempt property not on hand at date of death.

Said Section 44 provided "that at the first term of the court, **after the original grant of letters testamentary, or of administration,** it shall be the duty of the chief justice", etc. Clearly, said Section 44 had nothing whatsoever to do with the powers, rights and duties of administrators pro tem.

The same thing is equally true of Section 45 which provided "that at the first term of the court **after an inventory and list of claims have been returned,** it shall be the duty of the chief justice to set apart", etc.

Said Probate Act contained the express requirement that the executor or administrator should, at a specified time, file an inventory, appraisement and list of claims of the estate: that law contained absolutely nothing similar to that with respect to administrators pro tem.

It will be observed that opposing counsel have cited no Texas case—in fact, no authority whatsoever—in support of their contentions as set out on pages 2 to 5 of said reply of Barnsdall Oil Company, et al.

There is no such Texas case and, apparently, diligent counsel were unable to find any outside case or authority for their propositions.

On page 5 of said brief counsel for Barnsdall Oil Company, et al, have cited Dull vs. Drake, 4 S. W., 364; Cruse vs. O'Gwin, 106 S. W., 757; Reed vs. Harlan, 103 S. W. (2d), 236; Saul vs. Frame, 22 S. W., 984; and Corley vs. Anderson, 23 S. W., 839.

We have already sufficiently considered Dull vs. Drake and Cruse vs. O'Gwin.

In Reed vs. Harlan no act of a temporary administrator was involved or considered: in fact, the court there said:

"No action under special powers granted in his appointment as temporary administrator was shown". In that case the person appointed temporary administrator was subsequently made permanent administrator and thereafter functioned "as permanent administrator, without question, until April 3, 1935".

As shown by quotation therefrom on page 6 of said reply of Barnsdall Oil Company, et al., Reed vs. Harlan was there cited in support of the general proposition that the orders of a probate court made in the course

of general administration of an estate "are not absolutely void and can be set aside after the expiration of the term only on direct attack", etc. On page 17 hereof we have effectually answered that contention, with citation of authorities, and shall not here repeat what is there said.

Saul vs. Frame, supra, involved no question whatsoever with respect to the rights, powers and duties of a temporary administrator or administrator pro tem. Opposing counsel have cited it only on the general proposition re collateral attack and no comment on it is deemed necessary.

As far as we can see, Corley vs. Anderson, supra, has no bearing whatsoever on any question now before this court and, therefor, needs no consideration here.

None of the other cases cited by counsel for Barnsdall Oil Company, et al., on page 7 of their brief, involved the power, if any, of the probate court to authorize a mere temporary administrator or administrator pro tem to sell and convey real estate: therefore, we make no comment thereon.

Under Section 23 of Act of March 20, 1848, the probate court was itself without power to authorize the administrator pro tem appointed pursuant thereto either (a) to investigate, and then allow or reject claims against the estate, or (b) to sell land belonging to the estate—this, more especially in view of the plain verbiage of Section 135 of said Probate Act of March 20, 1848.

Bearing in mind the fact that at common law neither an administrator nor a temporary administrator had anything whatever to do with land belonging to the decedent and also bearing in mind the inclusion in Probate Act of March 20, 1848, of Section 135, it seems self-evident that if the Texas Legislature had intended,

when enacting that probate law, to confer upon the probate court power to authorize a mere administrator pro tem to sell and convey land belonging to the estate, such a radical departure from the rules and principles of the common law would have been covered by an express provision to that effect, wholly free from ambiguity or uncertainty.

On page 8 of reply of J. O. Phillips, et al., it is broadly and incorrectly stated that "under the common law it is the duty of **any** administrator, temporary or otherwise, to pay debts and expenses of administration, for such purpose having the right to use **ANY** of the assets in hands".

In Thompson vs. Duncan, 1 Texas, 485, the Supreme Court of Texas said:

"The rule of the common law is that the personalty shall go to the legal representative, and the realty shall descend to the heir, on the death of his ancestor. The heir takes the land subject to a particular grade or dignity of debt, but the personal representative has nothing to do with it".

In Stevenson vs. Roberts, 25 Texas Civil Appeals, 577, and 64 S. W., 230, the court said:

"At common law, real estate was not subject to administration, but the executor took the legal title to the personal property of the testator, with power of disposition over it".

Such was the law of Texas at date of attempted sale by Fullerton as administrator pro tem to Robert Mott, except as expressly modified by Probate Act of March 20, 1848.

"The common law rule was that the real estate of a decedent could not be subjected to payment of his

debts unless such debts were specifically charged thereon by his will". (24 C. J., p. 459, Sec. 1261, citing both English and American cases.)

On January 20, 1840, the Congress of the Republic of Texas enacted "an Act to adopt the Common Law of England, to repeal certain Mexican laws, and to regulate the marital rights of parties". Section 1 of said Act read thus: "Be it enacted by the Senate and House of Representatives of the Republic of Texas, in Congress assembled, that the common law of England (so far as it is not inconsistent with the Constitution or the Acts of Congress now in force) shall, together with such Acts, be the rule of decision in this Republic, and shall continue in full force until altered or repealed by the Congress". Such has been the law in Texas ever since January 20, 1840.

The comprehensive Texas probate law of March 20, 1848, took the place of and superseded an act of date February 5, 1840, enacted by the Republic of Texas, entitled: "An Act regulating the Duties of Probate Courts, and settlement of Succession". Said last mentioned Act was in force until March 20, 1848. Said Act of February 5, 1840, contained no provision whatsoever, as far as we can find, for the appointment of a temporary administrator, or administrator pro tem, or administrator pendente lite.

From the foregoing it is indisputable that in Texas prior to March 20, 1848, in any event, there was no statute providing for the appointment of administrators pro tem, or temporary administrators, and further that thereafter upon common law principles such temporary administrator or administrator pro tem had, and could have, absolutely nothing to do with land belonging to the decedent, and no court was empowered to attempt

to authorize such administrator pro tem to sell land belonging to his intestate.

On page 2 of their brief counsel for J. O. Phillips, et al. state, with much emphasis, that the title conveyed to Robert Mott by Fullerton as administrator pro tem "has been the **active title"**, etc.

Now, we know of no Texas law or court decision defining or explaining what constitutes "an active title" and/or what constitutes "an inactive title"; but we do know that in Texas mere "activity" never creates "a title", whether to land or personalty. The true question at issue herein was thus properly stated by Circuit Judge Holmes: "This is a suit to recover a two-thirds interest in certain real estate in Nueces County, Texas ***** **Our decision turns upon the validity of a temporary administrator's deed** which was executed on March 1, 1860. It is admitted that, if the deed is good and conveyed title to the land, the judgment of the court below should be affirmed". The Circuit Court of Appeals held the deed to be "good" and, therefore, that it "conveyed title to the land". There is, properly, nothing in the opinion of that court concerning either "activity of title" or "inactivity of title".

Either the deed made by administrator pro tem to Mott passed the title to the land or it did not pass it. If that deed did not convey the "title" to Mott, then none of the numerous persons and corporations attempting to deraign title from and under Mott has ever acquired any "title" to any part of the land involved herein. The case here involves no element of estoppel. No party hereto even remotely hints that he or it was in any manner mislead by any supposed "inactivity of title" on the part of your petitioners. There is no claim that "the record" in the probate cause at Corpus Christi in

re estate of John Peter Schatzel, deceased, did not on its face, at all times during such alleged "activity of title", affirmatively and clearly show that Mott's sole claim of title rested upon the attempted conveyance made to him by Fullerton as administrator pro tem. It is not even remotely hinted that any of the records in that probate cause at Corpus Christi have ever been lost or destroyed. Hence, there is absolutely no room for the indulgence of any presumption or presumptions in favor of the alleged "active title".

It is well recognized law in Texas that, aside from claims of title based upon adverse possession under applicable statutes of limitation, it is legally unimportant that your petitioners and their ancestors have not paid taxes on the land involved herein nor taken actual, physical possession of it; also, that the doctrine of stale demand never applies in Texas as against the owner of a legal title to land.

In Murphy vs. Welder, 58 Texas, 235, it was said:

"In the present case the defendants in error have a clear legal title to the land in suit, perfect on its face, and to such a title the plea of stale demand alone could not possibly constitute a defense. ***** No conclusion, adverse to the legal title of the true owner, can be drawn from the fact that, after his title is perfected, he refrains, for a long period of time, to take corporeal possession of his land. His title, in law, draws to it the possession, and this constructive possession remains with the holder of the fee until some hostile act, amounting in law to an act of ouster, destroys this character of possession ***** We know of no authority to warrant the court in holding that the mere failure to pay taxes or the laches or delay of the owner in bringing suit for recovery of the land to which he has a legal title, will defeat his action, where there has been no actual adverse possession for a suf-

ficient length of time to support a plea of limitation. Williams vs. Conger, 49 Texas, 602. These views are very pertinent to questions in this case before the court and are conclusive against the plea of stale demand".

Murphy vs. Welder has been frequently followed in later Texas cases.

As far as concerns the question of alleged laches, failure to take possession, failure to pay taxes, alleged inactivity of title, etc., the facts involved in Higgins Oil & Fuel Company vs. Snow, 113 Fed., 433, were quite similar to those involved herein. In that case the suit was brought in 1901, while the title asserted by Mrs. Snow originated in 1871. In that case a very able trial judge among other things said:

"The first question presented (i. e., that of alleged laches on the part of Mrs. Snow) has been frequently decided by the Supreme Court of Texas, where it is held that, if the complainant's title is a legal one, as in the present case, capable of being established at law, the doctrine of laches and stale claim does not apply. **It is simply a question of adverse possession.** San Patricio Corporation vs. Mathis, 58 Texas, 242; Moss vs. Berry, 53 Texas, 632; Williams vs. Conger, 49 Texas, 602; House vs. Brent, 69 Texas, 30; Lumber Company vs. Pinkard (Texas Civ. App.), 23 S. W., 723; Land Company vs. Hyland (Texas Civ. App.), 28 S. W., 206". (Bold face ours)

That pronouncement of the law was approved by the U. S. Circuit Court of Appeals.

A few of the numerous Texas decisions illustrating when presumptions may, or may not, be properly indulged by a court are these, to-wit:

Town of Refugio vs. Strauch, 29 S. W. (2d), 1041;
Baker vs. Coe, 20 Tex., 429;

Pendleton vs. Shaw, 44 S. W., 1002;
Hanson vs. Henson, 15 S. W. (2d), 579;
Chapman vs. Brite, 23 S. W., 514;
Mills vs. Herndon, 60 Tex., 353, 360;
McCarty vs. Merry, 59 S. W., 304, 306 (error refused);
Debrell vs. Ponton, 22 Tex., 686;
Geffert Case, 290 S. W., 1083;
Loving, etc. Co. vs. Higginbotham, 115 S. W. (2d), 1110;
Allar vs. Roeser, 217 S. W., 442;
McNally vs. Haynes, 59 Tex., 583;
West vs. Cameron, etc. Co., 4 S. W. (2d), 111;
Harrison vs. Barngrover, 72 S. W. (2d), 971;
Jobe vs. Osborne, 97 S. W. (2d), 939;
McMaster vs. Childress, 30 S. W., 843 (error refused); and
Frost vs. Crockett, 109 S. W. (2d), 529, 533.

On pages 8 and 9 of reply brief of J. O. Phillips, et al. cases are cited to support the proposition that "at all events the judgment attacked herein was a judgment of a court of general jurisdiction, immune against collateral attack".

None of the cases there cited supports the broad, sweeping proposition of alleged law thus stated. None of them in any manner conflicts with the Texas cases cited in our original brief herein re collateral attack.

Probably no stronger or better answer to that alleged proposition of law can be made than was made by this court, per Mr. Justice Field, in Windsor vs. McVeigh, 93 U. S., 274. At page 282 the court said:

"The doctrine invoked by counsel that, where a court has once acquired jurisdiction, it has the right to decide every question which arises in the cause, and

its judgment, however erroneous, cannot be collaterally assailed, is undoubtedly correct as a general proposition, but, like all general propositions, is subject to many qualifications in its application. All courts, even the highest, are more or less limited in their jurisdiction: they are limited to particular classes of action, such as civil or criminal, or to particular modes of administering relief, such as legal or equitable; or to transactions of a special character, such as arise on navigable waters, or relate to the testamentary disposition of estates; or to the use of particular process in the enforcement of their judgments. Though the court may possess jurisdiction of a cause, of the subject matter and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgements. It must act judicially in all things, and cannot then transcend the power conferred by the law. (Giving illustrations) The judgments mentioned, given in the cases supposed, would not be merely erroneous; they would be absolutely void, because the court in rendering them would transcend the limits of its authority in those cases". The court then cited and discussed Bigelow vs. Forrest, 9 Wallace, 351, and said: "Doubtless a decree of a court, having jurisdiction to make the decree, cannot be impeached collaterally; but, under the act of Congress, the District Court had no power to order a sale which should confer upon the purchaser rights outlasting the life of French Forrest (the owner). Had it done so, it would have transcended its jurisdiction. **** The doctrine stated by counsel is only correct when the court proceeds, after acquiring jurisdiction of the cause, according to the established modes governing the class to which the case belongs, and does not transcend, in the extent or character of its judgment, the law which is applicable to it. The statement of the doctrine by Mr. Justice Swayne, in the case of Cornell vs. Williams,

reported in the 20th of Wallace, is more accurate. 'The jurisdiction' says the Justice, 'having attached in the case, everything done **within the power of that jurisdiction,** when collaterally questioned, is held conclusive of the rights of the parties, unless impeached for fraud' ".

Another lucid and unanswerable reply to that general proposition of opposing counsel herein is contained in United States vs. Walker, 109 U. S., 258. This court there held to be void for want of jurisdiction a judgment by Supreme Court of District of Columbia, directing an administrator who had been removed, to pay over to an administrator de bonis non appointed in his place, a sum collected by the former from the United States for a claim due to the intestate. There this court quoted Section 976 of Revised Statutes relating to the District of Columbia and among other things said:

"Although a court may have jurisdiction over the parties and the subject matter, yet if it makes a decree which is not within the powers granted to it by the law of its organization, its decree is void". The court then cited and discussed several earlier cases, including Windsor vs. McVeigh, supra, and said:

"In this case the statute gave the court power, on the removal of an executor or administrator, to order the assets of the decedent, which might remain unadministered, to be delivered to the administrator de bonis non. The court made an order directing delivery of the proceeds of administered assets. This was beyond the power conferred by the statute, and not within the jurisdiction of the court. The order was, therefore, void".

Incidentally, United States vs. Walker also supports our contention that at the common law even a regular or permanent administrator was wholly without power to sell land belonging to the decedent, and the probate or

chancery court was without power to authorize such sale. Among other things this court there said:

"It is well settled at common law that 'the title of an administrator de bonis non extends only to the goods and personal estate, such as leases for years, household goods, etc., which remain in specie and were not administered by the first executor or administrator, as also to all debts due and owing to the testator or intestate'. Bacon's Abr. Title Executors and Administrators, B 22, citing Packman's Case, 6 Coke, 293 (part VI, 1, 8 B)."

Also: "An administrator de bonis non derives his title from the deceased, and not from the former executor or administrator. To him is committed only the administration of the goods, chattels, and credits of the deceased which have not been administered."

What is there said as to the administrator de bonis non is equally applicable to an administrator pro tem or temporary administrator, or permanent administrator, as far as concerns the particular properties, only, to which such administrator, etc. is entitled to administer.

Of the cases re collateral attack cited by opposing counsel, Martin vs. Robinson, 67 Texas, 368, and 3 S. W., 550, is typical. Among other things the court there said:

"When a court of record, having general jurisdiction, has assumed to exercise it in a given case, all presumptions are in favor of the validity of its proceedings; and **if the record** of such a court shows the steps necessary to clothe it with power to act in the given case were taken, **or if the record be silent on this subject,** then its judgment, order, or decree must be held conclusive in any other court of the same sovereignty when collaterally called in question", citing earlier cases.

In the instant case "the record" affirmatively discloses, to the complete exclusion of any presumptions, that the probate court of Nueces County, Texas, attempted to confer upon a mere administrator pro tem the power to sell and convey land belonging to the estate—a power not conferred by Probate Act of March 20, 1848, upon the court as a court or upon the administrator pro tem as such.

In Harrison vs. Barngrover, 72 S. W. (2d), 971 (writ of error refused by Texas Supreme Court) the court among other things said:

"For any court to act within its jurisdiction, in the sense that its judgment is immune from collateral attack, it must not only have jurisdiction of the parties and of the res or property to be dealt with, but it must also have the power to enter the kind of order, judgment or decree which is the subject of the attack. Cline vs. Niblo, 117 Texas, 474, 8 S. W. (2d), 633, 638, 66 A. L. R., 916; Smith vs. Paschal (Texas Com. of App.), 1 S. W. (2d), 1086; Freeman on Judgments (5th Ed.), Sec. 372. It has long been recognized in this state that probate courts have only such powers as are delegated to them by statute. St. Paul Sanitarium vs. Crim, 84 S. W., 1114 (writ of error denied); Marks vs. Hill, 46 Texas, 345; Smith vs. Paschal, supra; Cline vs. Niblo, supra. The Constitution, in conferring upon the County Court or Probate Court exclusive original jurisdiction as to estates of minors, deceased persons, etc., simply conferred upon such court the general powers to administer the probate law. The specific powers to be exercised by the probate court and the manner of their exercise was left to statutory regulation by the Legislature. ***** Irrespective of the character or dignity of the tribunal pronouncing the decision, whether of inferior, limited or superior general jurisdiction, it must confine

its determination within the authority it possesses under the law and the case. If the court is exercising special statutory powers, the measure of its authority is the statute itself, and a judgment in excess thereof is null and void and subject to collateral attack, a rule which finds frequent application in the case of probate judgments".

In Harrison vs. Barngrover, supra, the court further said:

"In the case before us the Probate Court of Liberty County was acting under a statute which not only conferred upon it the specific power to lease the ward's land, but also specified the manner in which the power was to be exercised and the limitations upon the power thus granted. Thus the 'course of the court' was marked out by the Act, and the power to lease, specifically limited. No grant or lease not made in conformity with it could have any validity, nor could it confer any title not authorized by it. Therefore, in so far as the probate court assumed to lease the land of the minors beyond the time of their minority, it acted wholly without authority, and to that extent its judgment was a nullity. That the judgment was void in that respect was apparent upon the face of it. Being a nullity, it was subject to attack in any court, and there can be no doubt that the trial court was correct in so holding".

Possibly we should add that this court denied certiorari in Harrison vs. Barngrower: see 294 U. S., 731.

In Texas, at least, it has long been thoroughly established law, in fact elementary, that even a collateral attack may be made upon any order or judgment of a court of general jurisdiction **provided** when making such attack you confine yourself wholly to undisputed facts apparent of record in the original cause and, therefore,

are not required to resort to evidence aliunde that record.

Now, in this case your petitioners have not attempted to resort to evidence aliunde but have relied and are relying wholly upon undisputed facts which clearly and indisputably appear of record in the probate cause involving administration of estate of John Peter Schatzell, deceased.

The record in that cause shows indisputably as follows: (a) That Fullerton was a mere administrator pro tem when he applied to the court for authority to sell and convey the land involved herein; (b) that the order of court upon that application treated said Fullerton as such administrator pro tem only; (c) that when making the sale to Mott Fullerton acted only as administrator pro tem and so acted when he reported that sale back to the court for confirmation; (d) that the court treated and considered Fullerton as a mere administrator pro tem when the court approved that report of sale to Mott and attempted to authorize Fullerton as such administrator pro tem to execute and deliver a conveyance to Mott; and (e) that when executing and delivering that deed or conveyance to Mott said Fullerton acted merely as an administrator pro tem and so acted pursuant to alleged authority granted to him by said last mentioned orders of court.

These matters have been apparent of record in Nueces County, Texas, ever since they originally occurred. Mott was charged with notice of these undisputed record facts and with knowledge of the law applicable thereto; the same has been true of every person or corporation which has bought or leased in reliance upon that attempted conveyance to Mott. No question of innocent purchaser for value, without notice, is remotely involved herein.

Mott bought with his eyes open: the same thing is true of every one claiming under Mott.

Hence, if the legal title to the land involved herein did not pass to Robert Mott by force of the attempted conveyance thereof to him by Fullerton as administrator pro tem of the Schatzell estate, then it follows indisputably that the legal title thereto remained vested in James W. Zacharie, as devisee of Schatzell, and in these petitioners as his heirs at law, wholly irrespective of the long time which has elapsed since the attempted sale and conveyance to Robert Mott.

The law of Texas is thus properly stated in 14 Texas Jurisprudence, page 226, Section 447, to-wit: "The order of sale is a judgment of the probate court, and, **where the court has jurisdiction,** it is not subject to collateral attack. However, according to settled principles of the law of judgments, this rule does not obtain if the sale is void, as is the case **where the court had no jurisdiction to make it.** ***** While the law presumes everything legally necessary to have been done by the probate court, this is, of course, overcome when it is shown that the facts are to the contrary. And **there will be no indulgence of presumptions that are repelled by the record.**" (Bold face ours)

No Texas court has ever indulged a presumption **contrary to** record matters, especially court proceedings. Also, in Texas orders will never be presumed to have been made by a court of record, which cannot be produced, **unless** it be first proved that the records of the court making it have been lost or destroyed.

Texas courts never presume the existence of any fact which is contrary to the proof in a cause.

Of course, these principles of law have been announced many times by this and other Federal courts.

The doctrine that in Texas there can be no abandonment of a legal title (since the adoption there of the common law) was affirmed (with citation of cases) by the learned trial judge who decided this cause, in T. H. Mastin & Company vs. Kirby Lumber Company, 14 Fed. Supp., 858, and 15 Fed. Supp., 537, Section 7.

Possibly it should be further stated that, under the Spanish law and the Mexican law, prevailing in Texas until January 20, 1840, the legal title to land might be lost by reason of abandonment thereof, but that has not been the law of Texas for the past 100 years or so.

In Texas, aside from inheritance or devise, there are only two ways for one to acquire the legal or record title to land, to-wit: (a) By conveyance from its owner and/or (b) by adverse possession under applicable statutes of limitation.

As the result of pre-trial conference and pre-trial order of court it was stipulated by all of the litigants herein that the cause should be preliminarily tried and decided by the trial court wholly upon "the abstracts of title, title papers and other documentary evidence" which should and would thereafter be filed by the respective litigants, and so decided in the light of trial briefs which were to be confined to said "abstracts of title, title papers and other documentary evidence" and to the four questions suggested in paragraph IV of said order, to-wit: (a) Whether or not title to the land vested in Mott by force of the attempted conveyance to him made by Fullerton as administrator pro tem; (b) whether said Schatzell's will was validly probated; (c) the legal effect, if any, on probate of will resulting from the certiorari proceedings instituted in District Court of Nueces County by alleged heirs of the decedent; and (d) the legal effect, if any, of the dismissal of said certiorari proceedings. (Tr., 25 and 228)

Said pre-trial stipulation and order further provided as follows: "The foregoing agreements are made the order of the court, but it is expressly agreed that same shall be without prejudice to any other defenses of the defendants herein as to alleged causes of action pleaded herein by plaintiffs and by intervenors, respectively, as such defenses may be set out in the amended pleadings to be filed herein by them, respectively, as hereinabove directed: provided, however, that nothing herein contained shall deprive any of the plaintiffs, or any of the intervenors, of their respective rights under appropriate pleadings herein to urge and rely on plea or pleas of coverture and/or other disabilities by way of reply to any and all defenses which may be urged herein by defendants herein under any statute of limitation or otherwise, and/or to plead and rely on any other matters by way of reply to any and all such defenses as may be pleaded herein by defendants or intervenors herein". Tr., 28, par. VI)

Hence, if this court should find and hold that the attempted conveyance of land to Mott by Fullerton as administrator pro tem was void, for want of power on the part of the probate court to authorize any such sale, and then remand the cause for further proceedings below, all of the respondents herein with whom your petitioners have not yet compromised and settled, will still have available as defenses herein their rights, if any, under applicable Texas statutes of limitation.

It is admitted that John Peter Schatzell was and is the common source of title as to all parties involved in this litigation. The sole question is whether his title did, or did not, vest in Mott as the result of that which was done by the probate court and Fullerton as administrator pro tem acting under said orders of probate court of Nueces County.

In Texas it has always been comparatively easy to acquire title to land by force of adverse possession, under various statutes of limitation, commonly known in Texas as (a) the three year statute of limitation; (b) the five year statute of limitation; (c) the ten year statute of limitation and (d) the twenty-five year statute of limitation.

CONCLUSION

In conclusion, and pleading the importance of this case to our clients as our apology for the length of this reply brief, we respectfully renew the prayer of Mary Zacharie Brock, et al., petitioners, that the Supreme Court of the United States will grant their petition for a writ of certiorari herein to the Honorable United States Circuit Court of Appeals, for the Fifth Circuit, and that following submission of this cause in the Supreme Court, in due course, this court will reverse both the judgment of the trial court herein and that of said United States Circuit Court of Appeals herein, and remand this cause for further proceedings in the trial court, in accordance with the principles of law to be announced by the Supreme Court, thus affording all and singular the respondents herein their opportunity to make such further defenses herein, if any, as to them, respectively, may be available, whether under applicable Texas statutes of limitation or otherwise; also, that this court will tax and adjudge all costs in said United States Circuit Court of Appeals and in this court against the respondents hereinabove named: and further that said petitioners, Mary Zacharie Brock, and others, be granted

by this court any and all such additional relief, general and special, legal and equitable, as may be their due.

Respectfully submitted,

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Witness the personal signature of:

.....

Pritchett Harvey, Esq., Houston, Texas, is the attorney of record herein for Frank A. Ash and others, respondents and also petitioners for certiorari.

David B. Trammell, Esq., and Haynie E. Edwards, Esq., both of Fort Worth, Texas, are attorneys of record herein for J. O. Phillips, and others, respondents, who were intervening defendants in the trial court.

W. J. Howard, Esq., and Felix A. Raymer, Esq., both of Houston, Texas, are attorneys of record herein for respondents, Humble Oil & Refining Company, Humble Pipe Line Company, Barnsdall Oil Company and Flour Bluff Oil Corporation.

A copy of this reply brief has been mailed by counsel for Mary Zacharie Brock, et al., petitioners, to every one of the above named attorneys of record herein.

Office - Supreme Court, U. S.
FILED
JUN 28 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

_____ Term, 1941

No. 222

FRANK A. ASH, ET AL., *Petitioners*,

v.

BARNSDALL OIL COMPANY, ET AL., *Respondents*

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals, for the Fifth Circuit

AND BRIEF IN SUPPORT THEREOF

Of Counsel:
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Houston, Texas

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Houston, Texas,
Attorney for Petitioners

ALPHA LAW BRIEF CO., HOUSTON

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The granting of the writ of certiorari by the District Court of Nueces County, Texas, suspended the power and jurisdiction of the County Court of Nueces County, Texas, to proceed with a general administration of Schatzel's estate, or to sell lands belonging to said estate, during the pendency of the contest over his will pending in the District Court . . 15

While the contest over the probating of the will of Schatzel was pending on appeal in the District Court, the County Court of Nueces County was without power to order its temporary administrator to sell the lands of said estate, and such sale by the temporary administrator was void and passed no title 19

The judgment of the County Court of Nueces County, Texas, probating the will of Schatzel was vacated, set aside and annulled by the writ of certiorari issued by the District Court of that County, and said entire proceeding was thereby removed to the District Court for trial de novo; the burden resting

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on Zacharie, the proponent of said will, to prosecute the case to judgment probating the will in the District Court. That was not done, but the case was dismissed by the District Court in 1868. Such dismissal ended the case and left the will unprobated . . . 27

All of the judgments and orders entered by, and proceedings had before, Cornelius Cahill, Chief Justice and Judge of the Probate Court of Nueces County, Texas, in the matter of the estate of John P. Schatzel, deceased, were coram non judice and void, because the said Cornelius Cahill was a debtor of said estate and "interested" therein and thereby disqualified to act as judge in any proceeding incident to said estate or its administration 30

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IN THE

SUPREME COURT OF THE UNITED STATES

.....Term, 1941

No.....

FRANK A. ASH, ET AL., *Petitioners,*

v.

BARNSDALL OIL COMPANY, ET AL., *Respondents*

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals, for the Fifth Circuit

---

TO THE HONORABLE SUPREME COURT
OF THE UNITED STATES:

The petition of Frank A. Ash, John F. Ash, Samuel G. Ash, Elsie Barford and husband Lewis C. Barford, Anna Katharine Dorothea Becker, nee Schmitt, widow, Mrs. Lilli Elizabeth Behrens, widow, Hedwig A. Bender and husband J. Phillip Bender, Dorothy R. Bonhall and husband Leroy H. Bonhall, Anna Maria Cusnich and husband Friedrich Cusnich, Eduard Capito, Georg Capito I, Johanna Meth Capito, Wilhelm Capito, Mrs. Kenneth Delaplane, widow, Katharine Emig and husband Peter Emig, Katharina Foebel, nee Lukas,

widow, Julia Fink and husband H. D. Fink, Howard H. Flurer, Verne G. Gram and husband Fred S. Gram, Catherine R. Haden and husband Edwin W. Haden, Elizabeth H. Hill and husband Howard R. Hill, Arthur Hillman, Christine Hillman, Anna Hougendobler, widow, Berta Hazel Johnson and husband George E. Johnson, Mrs. John F. (Rosetta) von Kaenel, widow, Julia Schoenberger Koehler and husband David Koehler, Anna W. Kraemer and husband John L. Kraemer, Zetta Bock and husband Adolf Bock, Mary Krock and husband Henry G. Krock, Wilhelm Josef Lange, Millie Larsen, widow, Margaretha Lauber and husband Friedrich Lauber, Katharine Liebegott, nee Lukas, widow, George Lukas, Helma Lukas, feme sole, Johann Lukas, Wilhelmine Katharine Lukas, feme sole, Mrs. Delia Miller, widow, Gustav Miller, Harriet L. Miller and husband John Edward Miller, Eleanor Schatzel McGuire, widow, Rose May Poling and husband S. H. Poling, Joe Raycraft, Julia M. Rupright, Albert E. Schatzel, Birdella P. Schatzel, Frank Schatzel, George P. Schatzel, Martha Schatzel, widow, Joe J. Schatzel, Juliet L. Shaper and husband Joel L. Shaper, Dorothea Johanna Schneider, widow, Alice Carroll Schilling, feme sole, Joseph Phillip Schmitt, George N. Schoenberger and wife Otta E. Schoenberger, Louis Schoenberger, Michael F. Schoenberger, William H. Schoenberger, Fred S. Schmunk, John Schmunk, Jr., William F. Schmunk, Mrs. Pearl Schwabel and husband Charles Schwabel, August N. Scritsmier, Frank S. Scritsmier, Harry E. Scritsmier, Justus H. Scritsmier, Kate A. Scritsmier, feme sole, Alma G. Stubbeman, feme sole, Earl C. Stubbeman, Joe H. Stubbeman, Wm. G. Stubbeman, Catherine Sweitzer and husband Charles Sweitzer, Albert Stauch, Mrs. Elvira S. Raven, widow, Anna E. Turkington and husband William A. Turkington, Ray Van Loon, Catherine S. Vogel, widow, Sophie Mag Wezh nee Capito, widow, Wade Byron Winslett, and G. H. Nagel (who were appellants in the Cir-

cuit Court of Appeals), respectfully present this Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review the decision and decree made and entered in said Circuit Court of Appeals on March 3, 1941 (Tr. 764-70). Petition for rehearing was duly and timely filed (Tr. 771), and denied by the Court on March 29, 1941 (Tr. 796-9). The opinion of the Circuit Court of Appeals will be found in Vol. 118, p. 699, FEDERAL REPORTER, 2nd series.

Summary Statement of Matter Involved

This suit was filed by Mary Zacharie Brock, and others, all nonresidents of Texas, against Barnsdall Oil Company, a Delaware corporation doing business in Texas; Flour Bluff Oil Corporation, Humble Oil & Refining Company and Humble Pipe Line Company, Texas corporations, for title and possession of a tract of land called the Flour Bluff peninsula, containing approximately seven thousand acres, a part of El Rincon de Corpus Christi grant in Nueces County, Texas, and for damages in the sum of four million dollars, the value of oil produced from said land by defendants (Tr. 34, 87).

At his death on October 23, 1854, John Peter Schatzel, a resident of Nueces County, Texas, owned said land. All parties to this suit claim under him. Plaintiffs, who are descendants of James W. Zacharie, claim under an alleged will of Schatzel which devised the land to said Zacharie (Tr. 41 to 60).

Petitioners, Frank A. Ash, and others above named, heirs of said Schatzel, intervened in the suit, claiming that the alleged will of Schatzel was not probated, and that the temporary administrator's sale, through which defendants deraign title, was void for want of jurisdiction in the County Court of Nueces County, Texas, to order sale of said land; and asserting title to said land as heirs of said Schatzel (Tr. 105, 117).

Defendants claim the land under a sale made by a temporary administrator, under order of the County Court of Nueces County, Texas, made while a contest was pending between Zacharie and the heirs of said Schatzel over the probating of the alleged will of Schatzel.

J. O. Phillips, and others (Tr. 220), Robertson Securities and Investment Company (Tr. 275), Alexander Duessen (Tr. 281), and Marjorie McKinley, and others (Tr. 284), intervened in the suit, as defendants, claiming royalty interests and mineral interests in the same land, under the same temporary administrator's sale. They and the original defendants made common defense against the plaintiffs and the interveners, Ash, et al.

The County Court of Nueces County, Texas, with Cornelius Cahill as Chief Justice, entered an order probating an alleged lost will of Schatzel; the heirs of Schatzel contesting. The District Court of Nueces County, by writ of certiorari issued on application filed by said contestants, removed said proceedings to the said District Court for trial de novo, as provided by the statutes of Texas. Samuel W. Fullerton, whom the County Court had appointed executor of said will, upon issuance of said certiorari, filed his petition in the said County Court that the decree establishing the will of said Schatzel having been superseded by certiorari to the District Court, prayed that he be appointed administrator pro tem of said estate during the pendency of the controversy; and said Cornelius Cahill, Chief Justice, entered an order appointing said Fullerton administrator pro tem of said estate, with limited powers to take charge of and preserve said estate pending said controversy. After the jurisdiction of the District Court over said estate had attached through said certiorari, and that of the County Court had been superseded or suspended thereby, the said County Court undertook to sell, and did order said Fullerton, administrator pro tem, to sell the lands belonging to said estate, including that involved

in this suit. The respondents claim under this pretended sale, made under orders of the County Court at a time when its jurisdiction to administer said estate had ceased. The statutes of Texas required that all matters brought to the District Court from the County Court, either by appeal or certiorari (concurent remedies) should be tried de novo; thus giving the District Court plenary powers over such proceedings.

The statutes of Texas required that pending a contest over probating of a will, that the Chief Justice of the County should appoint an administrator pro tem, with limited powers, to serve until the termination of the contest and the appointment and qualification of an executor or administrator with full powers. (R. C. S. TEXAS, Art. 3379.) It was under said statutes that the Chief Justice of Nueces County appointed said Fullerton administrator pro tem of said estate, after the jurisdiction of the County Court to administer said estate had been superseded by said certiorari proceeding.

On the trial of this case in the District Court of the United States for the Southern District of Texas, judgment was rendered in favor of the defendants for the land involved, and denying plaintiffs and interveners (these petitioners) all relief (Tr. 355 to 368).

The plaintiffs and interveners (these petitioners) filed appeals to the Circuit Court of Appeals for the Fifth Circuit.

While the case was pending in the Circuit Court, these petitioners dismissed their appeal as to the defendants, Barnsdall Oil Company, Flour Bluff Oil Corporation, Humble Oil & Refining Company, Humble Pipe Line Company, and J. O. Phillips (Tr._____), and Robertson Securities & Investment Company (Tr. _____).

Petitioners are entitled to judgment for the land, unless (1) the alleged will of Schatzel was probated, or (2) the sale by the temporary administrator made while the will contest was pending in the District Court of Nueces County, passed title to the purchaser at such sale.

The United States District Court held that the will was validly probated, and that the sale by the temporary administrator was valid and passed title (Tr. 362, 363, and 385).

The Circuit Court of Appeals held that the sale by the temporary administrator was valid and passed title to the land; but declined to decide the point whether the will was probated (Tr. 767), and affirmed the judgment of the District Court.

Jurisdiction

This petition for Writ of Certiorari is prosecuted by petitioners pursuant to the provisions of Sec. 240 of the JUDICIAL CODE (Title 28, Section 347, U.S.C.A.) and Rule 38 of the REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES, adopted February 13, 1939, and amended March 25, 1940, and October 21, 1940, providing for review on certiorari of decisions of the Circuit Courts of Appeal. The decision of the Circuit Court of Appeals was rendered March 3, 1941 (Tr._____); motion for rehearing duly filed was denied March 29, 1941 (Tr._____). This petition is filed June _____, 1941, within three months from date said motion for rehearing was denied.

Petitioners would further show that the Circuit Court of Appeals for the Fifth Circuit has rendered its decision herein on an important question of local law in a way which conflicts with the applicable local decisions, that is, the decisions of the Appellate Courts of the State of Texas, which are controlling on the issues. (KLAXON MFG. CO. v. ELECTRIC MFG. CO., 85 L. Ed. 971.)

Petitioners further contend that since the District Court of the United States for the Southern District of Texas held in this case that the will of Schatzel was validly probated and on such holding and conclusion rendered judgment against petitioners, the refusal of the Circuit Court of Appeals to review that holding, under proper assignments of

error urged by petitioners, and again presented in their motion for rehearing (Tr. 771-8), will deprive these petitioners of a vast quantity of land (other than that involved in this suit) owned by Schatzel at the time of his death, and which was not sold through administration proceedings on his estate; including a tract of 1500 acres called the "Rincon" (Tr. 443), and Mustang Island (Tr. 445)—because the judgment of the United States District Court, unless reversed, will operate as an estoppel against petitioners in any suit in which they are parties, involving said other lands, and prevent them from asserting their title thereto.

Houston Terminal Land Co. v. Westergren (Texas Supreme Court), 27 S.W. (2d), p. 526;
Harrison v. Bank, 224 S.W. 273;
Oklahoma v. Texas, 256 U.S. 70, 41 Sup. Ct. 420, 65 L. Ed. 831.

Therefore, such refusal will deprive petitioners of their title to such lands, without a day in court. (SAUNDERS v. SHAW, 244 U.S. 317, 61 L. Ed. 1163, 37 Sup. Ct. 638; HELIS v. WARD, 308 U.S. 365, 84 L. Ed. 327.) And is so great a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this court's power of supervision. (Sec. 5-b of Rule 38, REVISED RULES OF THE SUPREME COURT; Fourteenth Amendment to the CONSTITUTION OF THE UNITED STATES.)

Questions Presented

The following are the issues presented by this application:

(1) The Circuit Court of Appeals erred in holding that the sale made by the temporary administrator was valid and passed title to the land, because the legal effect of the writ of certiorari granted by the District Court of Nueces County to the County Court of said county, on application of the

Schatzel heirs for removal of said proceeding to the District Court, under the statute law and decisions of the Supreme Court of Texas, was to suspend the jurisdiction and power of the County Court to proceed with a general administration of said estate, or sell lands of said estate, while the matter was pending undecided in the District Court; and the sale, made under order of the County Court after said writ of certiorari with supersedeas was granted and the case removed to the District Court, was void and passed no title. The decision of the Circuit Court of Appeals conflicts with said local law of Texas.

(2) Under the Texas probate law, where judgment of the County Court probating a will was vacated and annulled by certiorari granted by the District Court under writ of supersedeas, the power of the County Court over such estate while the contest over the probating of the will was pending in the District Court, was by said statute limited to such proceedings as would preserve and care for the estate until final decision in the will contest; and an order of sale of lands belonging to the estate, made by the County Court while such contest was pending in the District Court, was void, and is subject to collateral attack. Such rule is not only by statute the law in Texas, but is the law as announced by the Supreme Court and the other Appellate Courts of Texas; and the holding of the Circuit Court of Appeals in this case is in conflict with said rule.

(3) The United States District Court held in this case that the will of Schatzel was validly probated by the County Court of Nueces County (Tr. 363); that the writ of certiorari granted by the District Court of Nueces County did not vacate or annul the judgment of the County Court; and that when the District Court dismissed the case, the judgment of the County Court probating the will was rein-

stated, revived and was placed in full force and effect as a final judgment.

Whether the dismissal by the District Court of the suit to probate the will, revived, reinstated and left in force the judgment of the County Court probating said will, or whether such dismissal was an end of the suit, and put all parties thereto out of court and left the will unprobated, are questions that have been before the Supreme Court of Texas many times, and it is the settled rule, supported by an unbroken line of decisions of the Texas Supreme Court, that where the judgment is removed from the County Court to the District Court by direct appeal or by certiorari, and the suit is then dismissed by the District Court, such dismissal puts an end to the suit. This rule is based on settled construction of Articles 471 and 1460, PASCHAL'S DIGEST OF STATUTES OF TEXAS, which requires such cases to be tried de novo in the District Court.

The above question was submitted by petitioners to the Circuit Court of Appeals, in this case by proper assignments. Said Circuit Court in its opinion, says:

> "Serious questions are raised as to whether the ultimate dismissal of the certiorari proceeding reinstated the probate of the will or left the parties out of court, and whether the bond given effected a proper supersedeas to stay probate proceedings. As to these, we make no decision," etc. (Tr. 767).

The Circuit Court of Appeals erred in refusing to consider said assignments and in refusing to decide said questions. Inasmuch as the United States District Court held that the will of Schatzel was validly probated, and that the dismissal of the suit to probate said will after the same reached the District Court by certiorari, left the judgment of the County Court in full force. The effect of the refusal of the Circuit Court of Appeals to decide said question will be to deprive

these petitioners of a vast quantity of land (other than what is involved here) which was owned by Schatzel at the time of his death, and which was not disposed of by any administration on his estate, as more particularly disclosed by the inventory in his estate which appears at pages 443 and 445 of the Transcript; because the judgment of the United States District Court, unless reversed, will operate as an estoppel against petitioners in any suit in which they are parties involving said other lands, and will prevent them from recovering such other lands; and they will be deprived of their title to said lands without a day in court, contrary to the Fourteenth Amendment to the CONSTITUTION. (HELIS v. WARD, 308 U.S. 365, 84 L. Ed., at p. 327.)

(4) The Circuit Court of Appeals erred in following the holding of the District Judge that there is a material difference between the "interest" of a County Judge who is a debtor of the estate being administered before his Court, and a County Judge who is a creditor of such estate, and in holding that the debtor relationship of C. Cahill, the County Judge who appointed the temporary administrator of Schatzel's estate, to the said estate, did not disqualify the said Cahill, nor render his acts in said estate coram non judice. Under the decisions of the Supreme Court of Texas, and the settled law in said state, such debtor relationship does disqualify (NEWCOME v. LIGHT, 58 Texas 141; GAY v. MINOT, 3 Cush. (Mass.) 352, cited with approval by the Supreme Court in NEWCOME v. LIGHT).

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

First

The sale by the temporary administrator Fullerton, acting under the assumed authority of the County Courts, at a time

when the entire probate matter of the Schatzel will was pending in the District Court of Nueces County upon removal from the County (Probate) Court of Nueces County, on certiorari application of the Schatzel heirs as contestants of the will, was void and passed no title to purchaser Robert Mott, because such removal had vested complete and exclusive jurisdiction thereof in the District Court and divested said County Court of any and all jurisdiction therein, under the statutes of Texas and the applicable decisions of the Supreme Court of Texas.

Under the laws of Texas the State Supreme Court is the highest court, and its decisions in applying such laws treat and hold the District Courts as superior in jurisdiction to the County Courts, and appeals from the County Courts to the District Courts are tried only *de novo*. And in this respect the Supreme Court of the United States follows the State Supreme Court. (KERSK LAKE, ETC., v. JOHNSON, 309 U.S. 485, 84 L. Ed. 881.)

Second

Under the probate laws of Texas, where the judgment of the County Court probating will was vacated and annulled by certiorari granted by the District Court under writ of supersedeas, the authority and jurisdiction of the County Court over such estate during the pendency of the will contest in the District Court, were by the Texas statutes and Supreme Court decisions limited to such proceedings as would preserve and protect the estate until final decision in the will contest; and an order of sale of lands of the estate, made by the County Court while such contest was pending in the District Court, was void, and subject to collateral attack. This is the Texas statute rule, and so held by the State Supreme Court.

And in this regard your petitioners invoke the jurisdiction of Your Honors under the KERSK LAKE case, *supra.*

Third

The Federal District Court held in this case that the will of Schatzel was validly probated by the County Court of Nueces County (Tr. 363); that the writ of certiorari granted by the District Court of Nueces County did not vacate or annul the judgment of the County Court; and that when the District Court dismissed the case, the judgment of the County Court probating the will was reinstated, revived and given full force and effect as a final judgment.

Whether the dismissal by the District Court of the suit to probate the will, revived, reinstated and left in force the judgment of the County Court probating the will, or whether such dismissal was an end of the suit, and put all parties thereto out of court and left the will unprobated, are questions that have been before the Supreme Court of Texas many times, and it is the settled rule, supported by an unbroken line of decisions of the Texas Supreme Court, *that where the judgment is removed from the County Court to the District Court by direct appeal or by certiorari, and the suit is then dismissed by the District Court, such dismissal puts an end to the suit.* This rule is based upon Article 471 REV. CIV. STATUTES OF TEXAS, which requires such cases to be tried *de novo.*

The foregoing question was submitted by Petitioners to the Circuit Court of Appeals, by appropriate assignments in the case, and the Court observed:

> "Serious questions are raised as to whether the ultimate dismissal of the certiorari proceeding reinstated the probate of the will or left the parties out of court, and whether the bond given effected a proper supersedeas to

stay probate proceedings. As to these, we make no decision," etc. (Tr. 767).

The Federal District Court having held the will validly probated, and the Circuit Court of Appeals having declined to pass upon such questions, it is apparent that lands owned by Schatzel, *but not affected by the sale of the administrator* —and such holdings are shown as large by the inventory (Tr. 443, 445)—may be lost to these petitioners, under estoppel, without even a day in court, unless reversed. Surely, this is not due process of law within the purview of the Fourteenth Amendment to the CONSTITUTION.

Fourth

The Probate Judge, C. Cahill of the Nueces County Court, was indebted to the Schatzel estate in a substantial sum at the time such estate was before him for administration and when he entered orders therein and appointed one Samuel W. Fullerton as temporary administrator, who made the sale hereinbefore set out.

Such indebtedness by said probate judge was in the sum of six hundred dollars and was reduced to judgment in order to collect. Within the purview of the CONSTITUTION OF TEXAS, then in effect, and the applicable decisions of the Texas Supreme Court, the said C. Cahill, as such debtor and judge, was "interested" in the cause before him, and thereby disqualified to act and his orders purporting to appoint said administrator were void. As the courts say, such orders were *coram non judice*.

Unlike the Federal District Judge, the Supreme Court of Texas says that it is immaterial whether the "interest" of the probate judge is that of *creditor* or *debtor* of the estate. (BURKS v. BENNETT, 62 Texas 277; NEWCOME v. LIGHT, 58

Texas 141, citing with approval GAY v. MINOT, 3 Cush. (Mass.) 352.

Again, may the petitioners invoke the long established decisions of the Texas courts of last resort in matters affecting titles to lands, which decisions have long been treated and held as valid laws of real property in Texas, and accordingly given the blessing of the United States Supreme Court.

WHEREFORE, your petitioners respectfully pray that Your Honors grant a Writ of Certiorari to issue to the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, in this case, commanding that Court to certify and send to this Court for review a full and complete transcript of the record and proceedings in the cause docketed there, No. 9662, styled Frank A. Ash and Mary Zacharie Brock, et al., appellants, v. Barnsdall Oil Company, et al., appellees; and that the judgments of said Circuit Court of Appeals and of the District Court be reversed and rendered in favor of your petitioners, as prayed for in the District Court and in said Circuit Court of Appeals, and as presented to that Court in the Assignments of Error and Propositions contained in the record above referred to and in their motion for rehearing.

Your petitioners pray for such other and further relief in the premises as this Honorable Court may deem just.

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Houston, Texas,
Attorney for Petitioners

Of Counsel:
PRITCHETT HARVEY,
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BRIEF IN SUPPORT OF THE FOREGOING PETITION FOR CERTIORARI

The following argument is offered on the "Questions Presented" as set forth in the foregoing petition.

I.

The granting of the writ of certiorari by the District Court of Nueces County, Texas, suspended the power and jurisdiction of the County Court of Nueces County, Texas, to proceed with a general administration of Schatzel's estate, or to sell lands belonging to said estate, during the pendency of the contest over his will pending in the District Court.

The pertinent statutes are Articles 1287, 1288 and 1289 of PASCHAL'S DIGEST (Sections 27, 28, and 29 of the TEXAS PROBATE ACT OF 1848), which provide:

> Sec. 27 (Art. 1287). "Wills shall be probated, and letters testamentary or of administration, with full powers, shall be granted only in open court at a regular term thereof after application in writing, and notice, as hereinbefore required; but whenever it may appear to the Chief Justice that the interest of an estate requires the immediate appointment of an administrator, he shall either in open court or in vacation, by writing under his hand and the seal of the court, attested by the clerk, appoint some proper person administrator pro tem with such limited powers as the circumstances of the case may require. Such appointment may be made without notice—shall define the powers conferred, and before being delivered to the person appointed, shall be recorded in the minutes of the court; and the clerk shall indorse thereon a certificate that it has been so recorded; and until such record and certificate are made, the appointment shall not take effect. Such appointment shall cease to be of force on the first day of the term of the court

next after the date thereof, unless continued in force by an order entered on the minutes in open court; and in no case shall such appointment continue in force beyond the first day of the second term of the court after the date thereof."

Sec. 28 (Art. 1288). "Pending any contest relative to the probate of a will, or the granting of letters of administration, whether such contest be in the County Court, or in any other court on appeal, it shall be the duty of the chief justice to appoint an administrator pro tem in the manner prescribed in the preceding section, and with such limited powers as the circumstances of the case may require. Such appointment may continue in force until the termination of the contest, and the appointment of an executor or administrator with full powers."

Section 29, (Art. 1289) provides that the administrator pro tem shall give bond, and take oath, as required of other administrators.

Two methods were provided by the statutes of Texas for removal of proceedings in probate matters from the County Court to the District Court,—by direct appeal, and by certiorari. The Act of 1848, Art. 480, PASCHAL'S DIGEST, pertaining to the grant of the writ of certiorari, provides:

"Any person interested, desiring to have the proceedings of the County Court pertaining to the estates of decedents and wards, revised and corrected, may do so, by application to the judge of the District Court, and the judge of the District Court shall, upon such application being made, grant a writ of certiorari, to remove the proceedings to the District Court, there to be revised and corrected. And such certiorari shall not operate as a supersedeas, unless such applicant shall give a bond with good and sufficient sureties, payable to the chief justice of the County Court, in the same manner as in cases of appeal."

Art. 471 of PASCHAL'S DIGEST provides that the trial in the

District Court shall be de novo. From an early date, the Supreme Court of Texas has consistently held that the remedy of appeal by certiorari is concurrent with that of direct appeal, and that a case removed to the District Court by either must be tried de novo. (CHRISMAN v. NEWSOM, 9 Tex. 113; MOORE v. HARDISON, 10 Tex. 467; RAY v. PARSONS, 14 Tex. 370; WHITE DENTAL MFG. CO. v. HERTZBERG, 92 Tex. 528, 50 S.W. 122; HALL v. CLAIBORNE, 27 Tex. 222.) Judgment of the District Court in such cases are certified to the County Court to be carried into effect. (PASCHAL'S DIGEST, Art. 1460.)

The County Court of Nueces County, Texas, entered judgment January 5, 1856, probating the will of said Schatzel (Tr. 487). His heirs, contestants of the application to probate the will, filed their petition for writ of certiorari (Tr. 416) praying the removal of said proceeding to the District Court for revision, etc. On which the District Judge of Nueces County issued an order "to the Chief Justice of the County Court of said County of Nueces and to the Clerk thereof, requiring them to send up to the next term of the District Court of said County, all the proceedings had in said cause, that the same may be enquired into and justice done in the premises" (Tr. 422). This was done, April 1, 1856 (Tr. 425), and the case was thus removed to the District Court; contestants filing supersedeas bond (Tr. 423).

Thereupon, and in accordance with the provisions of Section 28, supra, the County Court of Nueces County entered the following order in said Schatzel's estate:

> "The petition of Samuel W. Fullerton showing that the decree establishing the will of John P. Schatzel, deceased, having been superseded by certiorari from the District Court of Nueces County, and praying that he be appointed administrator pro tempore of the estate of said Schatzell, deceased, during the pendency of the controversy of this cause, having been presented, it is con-

> sidered, ordered, adjudged and decreed by the Court after hearing the case and examining the law and evidence in relation to the matter, that Samuel W. Fullerton be and is hereby named and appointed administrator pro tempore of the aforesaid estate of John P. Schatzell, deceased, during the pendency of the controversy in this case, whose duty it shall be to gather and take into possession all the assets, demands and evidences of debt or title belonging to said estate, with full power and authority to do and perform all legal acts and take such proceedings as shall or may be necessary to maintain him in the possession and charge of said estate and property, real and personal, so as to preserve the same and prevent its removal or waste, until the further order and decree of this Court." (Tr. 502.)

From that time forward said Fullerton acted as administrator pro tem by virtue of the foregoing order and his qualification thereunder.

The decisions of the Texas Supreme, and Appellate Courts, is consistent from the earliest times, that the appeal suspends all proceedings in the county court, until the case is decided by the District Court. The following decisions are cited:

STONE v. SPILLMAN, Tex. Sup., Vol. 16, p. 432, the Court held: "We believe that if the answer be true (and it must be regarded to be true), a meritorious defense was offered; that the appeal suspended all proceedings until it was decided. The giving bond and security suspended all action until the appeal was tried and decided."

STONE v. BROWN, 16th Tex. Reports, at p. 431, the Supreme Court of Texas held:

> "We believe that the appeal in this case brings before us for revision the whole action of the probate court in relation to the will of the deceased, and the refusal to grant letters testamentary to the petitioner, and the grant of administration to the objectors."

WIREN v. NESBIT, 85 Tex. 286, 20 S.W. 128, the Texas Supreme Court said:

> "The appeal required the case to be tried de novo in the District Court. During the appeal the creditors could not sue on the bond any more than pending the action of the probate court on the account."

STEWART v. MOORE, 291 S.W. 891, the Supreme Court held:

> "It is apparent from the record in this case that the plaintiff in error filed appeal bond duly approved within the time prescribed by law. This admitted fact divested the county court of Tarrant County of all jurisdiction over the case. When the County Court was thus deprived of the jurisdiction eo instanti the District Court was invested with jurisdiction over the case."

EARL v. MUNDY, 227 S.W. at p. 724, writ of error denied, the Texas Court of Civil Appeals holds that "An appeal from the order probating the will required a trial de novo and suspends the final judgment, leaving the estate unsettled pending the appeal."

QUIROZ v. CANTU, 119 S.W. (2d), p. 568, writ of error denied, the Texas Court of Civil Appeals holds that

> "The appeal from the County Court to the District Court in the proceeding to probate the will had the legal effect to supersede the probating of the will and the appointment and qualification of the executor named thereunder."

II.

While the contest over the probating of the will of Schatzel was pending on appeal in the District Court, the County Court of Nueces county was without power to order its temporary administrator to sell the lands

of said estate, and such sale by the temporary administrator was void and passed no title.

Sections 27 and 28, of the PROBATE ACT OF 1848, do not admit of the construction placed thereon by the Circuit Court of Appeals. The striking contrast between the "full powers" of a permanent administrator, and the "limited" powers of an administrator pro tem. leaves no room for doubt. There would be no practical distinction between the two, if the construction of the Circuit Court of Appeals were correct. That such construction is directly in conflict with the local law of Texas, is clearly established by the decisions of the appellate courts of Texas. The very concept of temporary administrator suggests a suspension of regular administration proceedings until the estate is ready for permanent administration. Section 28 of said Act provides that the administrator pro tem. shall continue to act "until the termination of the contest and the appointment of an executor or administrator with full powers." If the County Court had the power, through means of a temporary administrator, to proceed to the extent held by the Circuit Court of Appeals, Section 28 of said Act becomes meaningless, and empty noise. The Legislature of Texas should not be convicted of not knowing the difference between the everyday words "full" and "limited."

Shortly after the Act of 1848 became law, this question was presented to the Supreme Court of Texas for decision, in the case of ALEXANDER v. BARFIELD (1850), 6 Tex. p. 400, in which the order appointing the temporary administrator empowered him "to transact all business as administrator of said estate until one may be appointed in our Court of Law." The Supreme Court, after quoting the provisions of Section 27 of said probate act, said:

"It will be seen, by comparing the evidence of the

> appointment of C. H. Alexander as recited, with the article cited from the Digest, under which it is assumed they were issued by the chief justice, that the requisitions of the law have not been regarded in scarcely a single essential particular. Instead of giving the limited powers for the particular occasion, they gave general and full powers, without any reference to being made a party to the suit, which was the only ground on which, in this case, the chief justice had any authority to act. The court below could not regard the pro tem. appointment of administrator as of any validity, and could only treat the same as a nullity."

The power to determine, allow, classify, and pay the debts of the estate, and to sell land of the estate for that purpose has never been recognized by the appellate courts of Texas as among the "limited powers" conferred by law upon a temporary or special administrator. Such appointment is not by order or judgment of the county court, but is made by the county judge (chief justice), in his capacity as such official; it may be made in vacation or in term time, without notice, delay, hearing, or opportunity for contest—is merely the ministerial act of that official. It has always been the universal ruling of the Texas appellate courts that his powers are limited to such as are expressly given in the order of appointment. (R. C. S., Art. 3379.) Thus, in DULL v. DRAKE, 68 Tex. 205, 4 S.W. 364, the Supreme Court says:

> "Our probate law does not contemplate that a temporary administrator shall have any powers except such as are expressly granted him by the County Judge at the date of his appointment. * * * The principal object of the temporary appointment is to preserve and keep the estate together until it can pass into the hands of a person fully authorized to administer it for the benefit of creditors and heirs."

The issue in DULL v. DRAKE was whether a sale of land

made by a temporary administrator under order of the county court, which was reported and confirmed by said court, was valid and passed title. The Supreme Court held the sale was void and that no title passed thereby. It is directly in point and completely supports our contention.

The application for the sale of the land in question was made by Fullerton, in his capacity of administrator pro tem. of Schatzel's estate (Tr. 518). On November 2nd, 1859, H. A. Gilpin, Chief Justice of Nueces County, made an order directing said Fullerton, as administrator pro tem. of said estate, to sell the land (Tr. 519). On February 21, 1860, said Fullerton, as administrator pro tem. of said estate, filed his report of sale of the land in this suit to Robert Mott (Tr. 521). The order confirming the sale recites that such sale was made by said Fullerton in his capacity as administrator pro tem. of said estate, and directs him, as administrator pro tem. of said estate, to execute a deed to Mott for said land. All of said orders and report recite on their face that said Fullerton was acting as administrator pro tem. of said estate. The deed executed by Fullerton to Mott shows on its face that said Fullerton acts in capacity of administrator pro tem. of said estate, and contains a verbatim copy of the order confirming the sale, which recites that he is administrator pro tem. of said estate (Tr. 526). The entire proceeding carries on its face patent proof of its invalidity. The Supreme Court of Texas, in the case of STAFFORD v. HARRIS, 82 Texas 184, 17 S.W. 530, on such a record, says:

> "While the county court, in the administration of estates, is a court of general jurisdiction, and, having jurisdiction of the subject-matter, every presumption is indulged in favor of the rightful exercise of its jurisdiction, still, when an order shows on its face the entire want of jurisdiction to make the same, it must be held invalid, and may be impeached in a collateral proceeding. The report of sale was of the sale of the land as made by

> a person who was unauthorized to make it. It was of a void sale. The order of confirmation undertakes to confirm a sale which appears from the order itself to be a void sale. A purchaser looking to the order of confirmation would be informed that it was made by a person who was unauthorized by law to make it, consequently of its nullity."

Other Texas decisions apply the same principle. In CRIER v. COWDEN, 251 S.W. 822, writ of error denied by the Supreme Court, a guardian had exchanged lands of his wards after authority to do so had been granted by the probate court, and subsequently the exchange was approved by the court. There was no statute in force authorizing the exchange of a ward's land. After reaching their majority the wards sued to cancel the guardian's deed and recover the lands. In affirming judgment for the wards, the Court of Civil Appeals of Texas said:

> "The deed sought to be cancelled is void because the application of the guardian, the order of the court, and the approval order, as well as the deed, show that the probate court had not the power to authorize the guardian to exchange the lands of the wards. Therefore, the orders were subject to collateral attack. Withers v. Patterson, 27 Tex. 491, 80 Am. Dec. 643; Marks v. Hill, Admr., 46 Tex. 345; Trammel v. Philleo, 33 Tex. 395. The guardian is nowhere authorized to exchange the lands of the wards by any statute, so the probate court acted in excess of its jurisdiction. Freeman on Judgments, Sec. 119; Crow v. Van Ness, 232 S.W. 539."

The Court held in MARKS v. HILL, 46 Tex. p. 351, that

> "The County Court had no authority to dispose of the property of an estate, except as it was conferred upon it by statute."

The Circuit Court of Appeals, in this case, takes the opposite

view, and cites, as authority: CASSEDAY v. NORRIS, 49 Tex. 613; CALLAHAN v. HOUSTON, 78 Tex. 494, 14 S.W. 1027; WILKIN v. SIMMONS, 151 S.W. 1145. CASSEDAY v. NORRIS was a sale made during a regular permanent administration, and may be dismissed as not bearing on the question. What the court actually held in CALLAHAN v. HOUSTON, supra, was that the county court could invest the temporary administrator with "such power as is temporarily necessary for the preservation of the estate." No sale of land was involved in that case; the issue being whether the court had power to authorize a temporary administrator to prosecute a suit on behalf of the estate. WILKIN v. SIMMONS, involved a sale made in the course of general administration of the estate, and is of no value on the question here.

A sale of land made by a temporary administrator, under order of the county court, was held to be void in the case of CREWS v. O'GWYN, 106 S.W. 757, by the Court of Civil Appeals, and writ of error denied by the Supreme Court of Texas, in which the court said: "The power to sell land has not been given to him by law." Citing DULL v. DRAKE, 68 Tex. 205, 4 S.W. 364; WILLIS v. PINKARD, 21 Tex. Civ. App. 423, 52 S.W. 626.

The Supreme Court, in FRANCIS v. NORTHCOTE, 6 Tex. 187, decided in 1851, held:

> "The jurisdiction of the County Court as a court of probate is conferred under the 15th Section of Article IV of the Constitution, which constitutes it an 'inferior tribunal' with a jurisdiction limited to certain enumerated subjects. These are: 'The appointing of guardians, granting of letters testamentary and of administration, settling the accounts of executors, administrators, and guardians, and the transaction of business appertaining to estates.'
>
> "Being a court whose powers are defined and limited by express law, its authority is restricted to the enume-

> rated subjects. It cannot transcend the powers conferred by the constitution and laws enacted in pursuance of it."

The Circuit Court of Appeals holds the County Court of Nueces County having acquired jurisdiction of the estate, had power to increase the powers of the temporary administrator beyond the "limited powers" required by the terms of Section 28, and by some legerdemain convert him into a general administrator with full powers. The Court overlooks the fact that the jurisdiction of the County "Court" over the estate had been ousted by the removal of said matter by certiorari to the District Court. Jurisdiction could not be in the two courts at the same time, or be split between the two. The Legislature recognized this when it provided in Section 27 that administrators with full powers should be appointed only "in open court at a regular term thereof,—and Section 28, that pending any will contest, whether in the County Court or in any other court on appeal, "it shall be the duty of the Chief Justice to appoint an administrator pro tem," with limited powers, etc. In Texas there is well defined distinction between a "judge" and a "court." In PITTMAN v. BYARS, 100 Tex. 518, 101 S.W. 789, the Supreme Court said:

> "Though a judge of the District Court may decide certain matters in vacation, and render judgment therein, yet such judgment, whether interlocutory or final, is not the judgment of the court over which he presides, but is merely his judgment as a district judge sitting in vacation."

When the Probate Court goes beyond the terms of the statute, its orders are void, as held in MOYERS v. CARTER, 61 S.W. 2d series, 1031, writ of error denied by the Supreme Court. The court in that case says that

> "The Court correctly appointed a temporary administrator to collect and hold in his possession the proceeds of the insurance policy. The probate court, when it permitted the temporary administrator to go beyond this power, and thereby to dissipate the entire estate during the temporary administration, acted in violation of our probate laws, and hence the orders are void." Citing DULL v. DRAKE, CRUSE v. O'GWYN, supra.

There is no decision by the Supreme Court, or by any of the Courts of Civil Appeals of Texas, holding that the County Court has power, through temporary administration, to order sale of lands belonging to an estate, and such is not the local law of this state. The holding of the Circuit Court of Appeals is in direct conflict with the settled law of Texas, and is unsupported by decision of any of the Appellate Courts of Texas. If the decision is not reversed, it will inject into the jurisprudence of Texas a doctrine wholly incompatible with the settled law of Texas on the extent of powers of temporary administrator; therefore, the question now before this Honorable Court is one of great importance to the people of Texas, and petitioners respectfully submit that, under the ruling in ERIE RAILWAY CO. v. THOMPSON, 304 U.S. 64, 82 L. Ed. 1188, this Honorable Court should exercise its power of revision, and reverse the decision of the Honorable Circuit Court of Appeals.

III.

The judgment of the County Court of Nueces County, Texas, probating the will of Schatzel was vacated, set aside and annulled by the writ of certiorari issued by the District Court of that County, and said entire proceeding was thereby removed to the District Court for trial de novo; the burden resting on Zacharie, the proponent of said will, to prosecute the

case to judgment probating the will in the District Court. That was not done, but the case was dismissed by the District Court in 1868. Such dismissal ended the case and left the will unprobated.

An alleged lost holographic will of John P. Schatzel was, on an application filed by James W. Zacharie, admitted to probate by the County Court of Nueces County, Texas, by judgment of said court January 5, 1856; the contest to said will filed by the heirs of Schatzel being overruled (Tr. 487). The contestants filed in the District Court of Nueces County, on March 1, 1856, a petition for a writ of certiorari praying the removal of said matter to the District Court. The District Court of Nueces County granted the writ as prayed for in the petition (Tr. 422), supersedeas bond being filed and approved (Tr. 423, 426), and the writ of certiorari was issued and executed on April 1, 1856 (Tr. 427). The venue of the case was transferred from the District Court of Nueces County to the District Court of Galveston County (Tr. 506). On June 3, 1868, the following final order was made in said case by the District Court of Galveston County, Texas, viz.:

> "On this day came the parties by their attorneys and dismiss this case, and the costs are paid" (Tr. 507).

Two ways are provided by the statute law of Texas for appealing from judgments of the County Courts in probate matters—one by direct appeal, and the other by certiorari from the District Court. The remedies are concurrent, and the trial in the District Court is anew, as if originally instituted in that court. The appeal, in either mode, operates to vacate and annul the judgment appealed from. The parties occupy the same relative positions in the District Court as in the County Court; the burden resting on the proponent in the District Court as in the court aquo to prosecute the suit to

final judgment, and in event the suit is dismissed in the District Court, that is the end of the case. Such has been the law in Texas from the earliest times. (CHRISMAN v. NEWSOM, 9 Tex. 113; MOORE v. HARDISON, 10 Tex. 467; RAY v. PARSONS, 14 Tex. 370; BINGHAM v. WATERHOUSE, 32 Tex. 468.) The proponent may discontinue, or dismiss, the proceeding, in either the County Court or after it reaches the District Court; but the contestants, occupying the position of defendants, are powerless to dismiss the case. (BINGHAM v. WATERHOUSE, supra.)

The dismissal of the case in the District Court does not revive the judgment of the Probate Court. This doctrine is as old as the Courts of Texas. (MILLER v. HOLTZ, 23 Tex. 138; ROBERTS v. MCCAMANT, 70 Tex. 743, 8 S.W. 543; CAVANAUGH v. CAVANAUGH, 238 S.W. 1019, writ denied by Supreme Court; HAYDEN v. MIDDLETON, 135 S.W. 2nd series, p. 283; HARTER v. CURRY, 101 Tex. 187, 105 S.W. 988; QUIROZ v. CANTU, 119 S.W. 2nd series, p. 568, writ of error denied by the Supreme Court; CALLAGHAN v. GRENET, 66 Tex. 237, 18 S.W. 508.)

In the case of CAVANAUGH v. CAVANAUGH, the suit was pending in the District Court on appeal from a judgment of the Probate Court refusing to set aside an order probating a will. The District Court dismissed the suit. The court held that

> "The dismissal of the cause in the District Court did not revive the judgment of the County Court from which the appeal was taken, but put all parties out of court."

In the case at bar, the District Court of the United States for the Southern District of Texas held that the will of Schatzel was validly probated by the County Court of Nueces County, and that the removal of said proceeding by

certiorari to the District Court, and the later dismissal thereof without a final judgment by the District Court probating the will, left the judgment of the County Court probating said will in full force and effect. That holding is in direct conflict with the settled law of Texas. The petitioners, in their appeal to the Circuit Court of Appeals, assigned error to that holding. The Court of Civil Appeals did not render a decision on that question, on the ground that it was unnecessary in view of their holding that the certiorari proceeding in the District Court did not oust or suspend the jurisdiction of the County Court to proceed with the administration of the estate, and that therefore the sale by the administrator pro tem passed title. In their motion for rehearing filed in the Circuit Court of Appeals, these petitioners urge said Court to consider and sustain their assignment (Tr. 771), and their motion was denied (Tr. 799). Petitioners believe that this Court should grant them a writ of certiorari herein and reverse the decision of the Circuit Court of Appeals, and of the District Court, because the rule is thoroughly settled in Texas, by repeated decisions of the Supreme Court of said state, that the removal of proceedings from the County Court to the District Court by appeal or certiorari, vacates the judgment appealed from, that the case stands for trial de novo in the District Court, and if dismissed in the latter court without a final judgment on the merits of the case, such dismissal is the end of the case, and the judgment of the County Court is not revived. The decisions of the Appellate Courts of Texas on the issue are controlling; and the decision in this case should be made to conform.

Petitioners further contend that since the District Court of the United States for the Southern District of Texas held in this case that the will of Schatzel was validly probated by the County Court, and on such holding and conclusion rendered judgment against petitioners, the refusal of the Circuit

Court of Appeals to review that decision and judgment of the District Court, will deprive petitioners of a vast quantity of land (in addition to that involved in this suit) owned by Schatzel at the time of his death, and which was not sold through administration proceedings on his estate, including a tract of 1500 acres called the Rincon, and also Mustang Island (Tr. 443 and 445);—because the judgment of the United States District Court, unless reversed, will operate as an estoppel against petitioners in any suit to which they are parties, involving said other lands, and will prevent them from asserting their title thereto. (HOUSTON TERMINAL LAND COMPANY v. WESTERGREN,—Texas Supreme Court, Vol. 27 S.W. (2d), p. 526; HARRISON v. BANK, 224 S.W. 273; OKLAHOMA v. TEXAS, 256 S.W. 70, 41 Sup. Ct. 420, 65 L. Ed. 831.) And the result will be that petitioners will be deprived of their property without a day in court. (SAUNDERS v. SHAW, 244 U.S. 317, 61 L. Ed. 1163, 37 Sup. Ct. 638; HELIS v. WARD, 308 U.S. 365, 84 L. Ed. 327.)

IV.

All of the judgments and orders entered by, and proceedings had before Cornelius Cahill, Chief Justice and Judge of the Probate Court of Nueces County, Texas, in the matter of the estate of John P. Schatzel, deceased, were coram non judice and void, because the said Cornelius Cahill was a debtor of said estate and "interested" therein and thereby disqualified to act as judge in any proceeding incident to said estate or its administration.

On January 5, 1856, the said Cornelius Cahill entered an order as Chief Justice of Nueces County, admitting to probate the alleged will of John P. Schatzel, deceased (Tr. 487), and on February 2, 1856, he appointed said Samuel W. Fuller-

ton administrator with the will annexed of Schatzel's estate (Tr. 492); said Fullerton promptly filed his oath and bond, which was approved by said Cahill (Tr. 494, 5); inventory, appraisement and list of claims was filed by said Fullerton (Tr. 497) showing among the assets of said estate "C. Cahill's note, June 4, 1854, $600.00" (Tr. 499). On April 28, 1856 (Tr. 501), said Samuel W. Fullerton filed his petition stating that the decree establishing the will of said Schatzel had been superseded by a writ of certiorari granted by the District Court; he prayed to be appointed administrator pro tem of the estate of said Schatzel during the pendency of said contest, and on the same day Cornelius Cahill entered an order appointing said Fullerton administrator pro tem of Schatzel's estate during the pendency of said will contest (Tr. 502, 3); and said Fullerton having filed bond, which was approved by said Cahill (Tr. p. 503), the said Cahill, Chief Justice, issued to said Fullerton letters of administration pro tem on said estate as prayed for (Tr. 504). From that time forward Samuel W. Fullerton acted as administrator pro tem solely by virtue of that order and his qualification thereunder.

From the date of death of John P. Schatzel on October 23, 1854, up to and including May 27, 1856, all orders, judgments and decrees relating to his estate were entered by Cornelius Cahill, who was then the judge of the Probate Court of Nueces County; and all proceedings in the estate were had before said Cahill.

The said Cornelius Cahill was a debtor of the Schatzel estate during all such period, as affirmatively and conclusively appears from matters of record in said estate. The first inventory made in the estate dated October 28, 1854 (Tr. 447), listed as an asset of said estate "C. Cahill's note dated June 4, 1854, $600.00," and in subsequent inventories (Tr. 499). On September 24, 1858, after Cahill had ceased to be Chief

Justice, suit against him was filed in the District Court of Nueces County and judgment against him was rendered on said note on December 16, 1858 (Tr. 428, 432).

Section 14 of Article IV of the CONSTITUTION OF TEXAS OF 1845, which was in force at the time, provided:

> "No judge shall sit in any case wherein he may be interested, or where either of the parties may be connected with him by affinity or consanguinity within such degrees as may be prescribed by law, or where he shall have been of counsel in the cause. * * * The disqualifications of judges of inferior tribunals, shall be remedied as may hereafter be by law prescribed."

Section 15 of said Art. IV, reads:

> "Inferior tribunals shall be established in each county for appointing guardians, granting letters testamentary and of administration, for settling the accounts of executors, administrators, and guardians, and for the transaction of business appertaining to estates." * * *

The Legislature of Texas, by Act of May 11, 1846, being Article 1406 of PASCHAL'S DIGEST, is as follows:

> "The District Courts shall have and exercise appellate jurisdiction, and general control over such inferior tribunals as have been or may be established in each county, for appointing guardians, granting letters testamentary, and of administration, for settling the accounts of executors, administrators, and guardians, and for the transaction of business appertaining to estates; and original jurisdiction in probate matters, only in cases where the judge or clerk of probate is interested."

The Act of the Legislature of Texas of December 29, 1849 (Art. 1228, PASCHAL'S DIGEST; 3 GAMMEL'S LAWS OF TEXAS, p. 21), providing an additional remedy in case of disqualification, reads:

> "Whenever the office of chief justice of any county in this state is vacant, or whenever the chief justice of any county court in this state shall be absent from the county, or unable to discharge the duties of his office, or shall be disqualified from attending to the duties of his office, by reason of interest, or from any other cause, then any two of the county commissioners of such county shall have power to do and perform all the duties of chief justice of the county court."

It is the settled law of Texas that if the judge of the Probate Court is a creditor of an estate administered by his court, he is disqualified to act therein, and all judgments and orders entered by and proceedings had before him are coram non judice and void. (BURKS v. BENNETT, 62 Tex. 277; CITY OF EL PASO v. FT. DEARBORN NAT'L BANK, 71 S.W. 799; FRIEBURG v. ISBELL, 25 S.W. 988; MOODY v. LOOSCAN, 44 S.W. 621, writ of error refused by Supreme Court.) It is also the general law that if the judge of a probate court is a debtor of an estate administered by his court, he is disqualified therein to the same extent as if he was a creditor of the estate. (GAY v. MINOT, 3 Cush. (Mass.) 352, cited with approval in NEWCOME v. LIGHT, 58 Tex. 141, 44 Am. Reports 604; STATE EX REL COCHRUN v. GRAHAM, 144 Oregon 705, 26 Pac. (2d), p. 46; 33 C. J. 997; CROOK v. NEWBERG, 27 SOUTHERN, p. 432.) The effect of Cahill's disqualification is not left in doubt by the decisions of the courts of Texas. A singular concurrence of opinion denounces every act of a disqualified judge as coram non judice and void. (TEMPLETON v. GIDDINGS, Tex. Supreme, 12 S.W. 851, judgment rendered by district judge on note collaterally assigned by firm of which he was a member. BURKS v. BENNETT, 62 Tex. 277, orders entered in administration proceedings by judge who held claims against the estate. NEWCOME v. LIGHT, 58 Tex. 141, 44 Am. Rep. 604, judgment for divorce in case wherein

judge had been consulted by one of the parties before he bebecame a judge.)

Disqualification may be proved by evidence dehors the record, on collateral attack (WEIL v. LEWIS, 2 S.W. (2d) 566; NONA MILLS COMPANY v. WINGATE, 113 S.W. 182, writ of error refused by Supreme Court.)

The Circuit Court of Appeals in this case held that the debtor relationship of Cahill, county judge, did not disqualify him from acting in the case,—and in support of that holding cited: CITY OF OAKCLIFF v. STATE, 97 Tex. 391, 79 S.W. 1068, in which the judge was interested as a possible taxpayer in a public enterprise, an interest only in common with all other taxpayers of the municipality party, and the other decisions cited by the said Court fall in the same category,—an interest wholly unlike that of debtor probate Judge Cahill, which was a direct personal obligation to the estate he was administering; and by his official position he "gained" several years' forbearance, even before he was sued for the debt. The record does not show that he ever paid the debt.

In GAY v. MINOT, supra, the Court, through CHIEF JUSTICE SHAW, said:

> "In the present case, the relation of the Judge to the deceased was that of a debtor and not a creditor. But the court are of the opinion that this relation created an interest of like kind with that of being a creditor, and under the statute, divested the judge of his jurisdiction."

Under the authorities, every act of the probate judge, Cornelius Cahill, relating to the estate of John P. Schatzel, deceased, was coram non judice and void. No legal effect can attach to any of his acts. No valid administration, therefore, was ever opened on the estate of Schatzel. The alleged will of Schatzel was never validly probated, and the heirs of James

W. Zacharie, the devisee in said will, have no right or title to the land in controversy. A judgment rendered by a disqualified judge is a nullity and leaves the case "remaining undisposed of as completely as if the judge had not been present at court." CHAMBERS v. HODGES, 23 Tex. 104; NEWCOME v. LIGHT, 58 Tex. 141, 44 Am. Rep. 604; WEIL v. LEWIS, 2 S.W. (2d), p. 566. Subsequent to May 26, 1856,—the date Cahill went out of office—the estate of Schatzel stood unaffected by any prior proceedings therein. Fullerton, having been appointed administrator by a disqualified judge, was not authorized to act as such, and his subsequent sale of the land was void. (ROSE v. NEWMAN, 26 Tex. 131, 80 Am. Dec. 646; STAFFORD v. HARRIS, 82 Tex. 184, 17 S.W. 530; KELSEY v. TRISLER, 74 S.W. 640.) It is only through an administrator, regularly appointed and qualified, that a probate court can sell lands of an estate. On this point the Supreme Court in ROSE v. NEWMAN, supra, says:

> "However plenary the powers of the county court may be upon the subject of a partition of a deceased person's estate, when a sale of property becomes necessary to carry out the partition, the administrator must sell and execute his deed, to divest the estate of title."

The decision of the Circuit Court of Appeals on the proposition above discussed, is undoubtedly unsupported by, and is in direct conflict, with the decisions of the Supreme and Appellate Courts of Texas, and calls for revision by this Honorable Court.

Conclusion

WHEREFORE, petitioners respectfully submit that their petition for certiorari should be granted, and that upon consid-

eration of the case the decision of the Circuit Court of Appeals and of the District Court should be reversed, and judgment rendered in favor of these petitioners.

Respectfully submitted,

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Houston, Texas,
Attorney for Petitioners

Of Counsel:
PRITCHETT HARVEY,
Houston, Texas

In The

Supreme Court of the United States

FRANK A. ASH ET AL., *Petitioners*
v.
BARNSDALL OIL CO. ET AL., *Respondents*

No. 222

MARY ZACHARIE BROCK ET AL., *Petitioners*
v.
BARNSDALL OIL CO. ET AL., *Respondents*

*No.*_____

Reply of J. O. Phillips et al., Respondents, to Petitions for Certiorari to the Fifth Circuit Court of Appeals

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DAVID B. TRAMMELL, *Fort Worth, Texas,*
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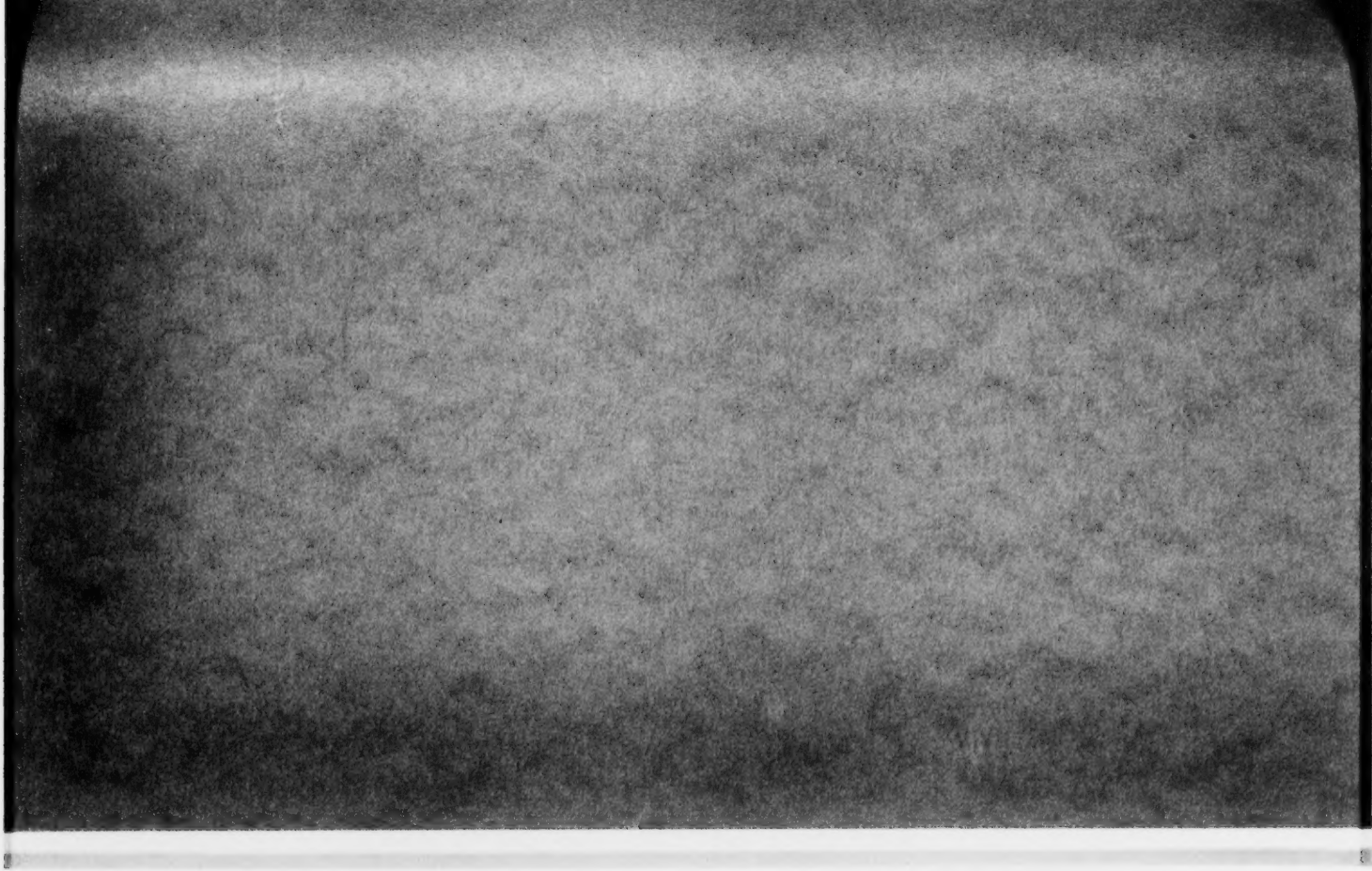

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*No.*_____

Reply of J. O. Phillips et al., to Petitions for Writ of Certiorari

May It Please the Court:

The opinion of the Circuit Court of Appeals is reported *Ash v. Barnsdall Oil Co.*, 118 F. (2d) 699.

The probate sale attacked as void in these proceedings was made March 1, 1860, to pay expenses and costs of administration and debts during the course of a contest by the ancestors of petitioners Brock et al. and petitioners Frank A. Ash et al. (both of which sets of claimants have filed petitions for certiorari), over the ownership of the estate, which contest at the time of the sale had continued over four years and pended some eight years longer; the administrator's deed being made after application, order, advertise-

ment, report of sale and confirmation, all statutory requirements having been followed (R. pp. 516-527). Such deed was recorded October 10, 1860, in the Deed Records of Nueces County (R. p. 524) *and the title thus emanating from the probate sale has been the active title, evidenced by hundreds of deeds, mortgages, releases and other instruments (R. p. 753), while the claims of both sets of petitioners have remained inactive and unasserted for a period of more than seventy-five years until after oil was discovered on the property.* (Paragraph (n), R. p. 381.)

It is contended by both sets of petitioners that the sale was void because made by Samuel W. Fullerton as administrator pro tem. It is also contended by petitioners Frank A. Ash et al. that the effect of the writ of certiorari proceeding was to suspend the jurisdiction and power of the County Court to proceed with the administration, and further, that Cornelius Cahill, the Chief Justice of Nueces County who appointed Fullerton administrator pro tem originally, was disqualified because a debtor of the estate, and that this disqualification invalidated all subsequent proceedings, although Fullerton was recognized as such administrator by two Chief Justices succeeding Cahill (the sale being ordered by the second successor Chief Justice), no disqualification being urged against either of them. Reply to these contentions will be made briefly in their order.

It is respectfully urged that the petitions for certiorari be denied for the following reasons:

1. There is presented no question of public importance such as to authorize this court to assume

jurisdiction by certiorari, the questions involved being merely one of local law of the State of Texas, arising under an early statute providing for the administration of estates, and the Circuit Court of Appeals has conflicted with no Texas decision as next hereinafter shown. (Section 5 of Rule 38 of this Court; *In re Woods*, 143 U. S. 202, 36 L. Ed. 125; *Forsyth v. Hammond*, 166 U. S. 506, 514, 41 L. Ed. 1095, 1098.)

2. The decision of the Honorable Circuit Court of Appeals is not in conflict with the three decisions cited by petitioners for that: (*a*) *Alexander v. Barfield*, 6 Tex. 400, the only case arising under the Probate Act of 1848, did not involve a sale by an administrator, but the right of an administrator pro tem to sue where no such authority was conferred by the order appointing him, and therefore the decision of the Circuit Court of Appeals here could in no way conflict therewith.[1] (*b*) *Dull v. Drake*, 68 Tex. 205, 4 S. W. 364, was decided **after** *(while the sale here questioned was made long prior to)* the Codification of 1879 of our Texas Statutes and the adoption of Art. 1882 of such Codification (now Art. 3379),[2] which

[1]The appeal was disposed of on another ground, and all that was said about administrators pro tem really dicta, the Court concluding that: "The case must be dismissed on the first point noticed, that there is no judgment in the court below from which an appeal will lie. Appeal dismissed." (6 Tex. 406.) The point is not stressed, however, as there was no conflict anyway.

[2]We quote such article:

"ART. 1882. Temporary administrators shall have and exercise only such rights and powers with regard to the estate, or such portions thereof as may be committed to their charge, as are specifically and clearly expressed in the order of the court appointing them, and any acts performed by them as such administrators that are not so expressly authorized shall be void." Revised Statutes of Texas of 1879, p. 279.

required the authority of the temporary administrator to be set forth in the order of appointment, denouncing all acts not so authorized as void. There was no compliance with this statute in *Dull v. Drake*, and the administrator neither gave bond, took oath nor returned inventory; there was no notice of sale, nor showing as to its necessity, nor even a sworn application for sale. As said by the court, the property was "*sold within a few days after the original grant of letters by a temporary administrator without compliance with a single prerequisite of such a sale prescribed by statute.*" (68 Tex. 207.) The failure of the order of appointment to confer power to sell, required by Art. 1882 adopted long subsequent to the sale here attacked, was recognized and followed by the court in saying: "*Our probate law does not contemplate that a temporary administrator shall have any powers except such as are expressly granted him by the County Judge at the date of his appointment.*" (68 Tex. 207.) Obviously, a decision under different law and a different state of facts cannot be said to conflict with the decision here, where every prerequisite of law was followed. (c) *Cruse v. O'Gwin*, 106 S. W. 757, was decided under the earlier Act of 1840 (which permitted the sale of real estate only after it appeared that the personal property was not sufficient Art. 1023, Hartley's Texas Digest, p. 331)[2] whereas

[2]Art. 1023, Hartley's Texas Digest, p. 331, being Sec. 29 of the Probate Act of February 5, 1840, under which *Cruce v. O'Gwin*, supra, was decided, reads:

"Be it further enacted, Every executor or administrator is bound, within three months after his appointment, to petition the Court of Probate, granting letters testamentary or administration, for the sale of all the perishable property belonging to the succession, and all or such

the Law of 1848 provided that sales should be made of that property most advantageous to the estate (Art. 1167, Hartley's Texas Digest)),[3] and under facts showing that the court at a special term appointed a temporary administrator and on the same date ordered him to sell the Robert Lucas League on credit. A report of sale was made, but there was no order of confirmation, and on the same day the administrator executed a deed the purchaser re-conveyed to him. Notwithstanding these facts, the court said that if there had been a confirmation or "*anything written on any paper filed in the case in the Probate Court that directly or indirectly indicated*

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portion of the other personal property except slaves, as may be shown to the court to be necessary for the payment of debts against said estate; **and in case, or if on further information, he finds that the proceeds of the sale of the personal property will not be sufficient for the payment of the said debts, he shall then, within six months after his appointment, or as soon as he ascertains the said deficiency, petition the Probate Court for the sale of the slaves and real estate of the decedent, or so much thereof as may be necessary for the payment of the said debts**; and the said court, on full and satisfactory proof of the existence of the debts, and the necessity of the sale, shall order the same on cash or credit as may be most advantageous to said estate, or as the nature of the claims against said estate may require." (Emphasis volunteered.)

[3]Section 58 of the Probate Act of March 20, 1848 (Art. 1167, Hartley's Texas Digest, p. 371), under which the sale here attacked was made, reads:

"**ART. 1167 (58) That all sales for the payment of the debts owing by the estate, shall be ordered to be made of such property as may be deemed most advantageous to such estate to be sold**; Provided, however, That no order shall be made to sell the slaves belonging to an estate, for the purpose aforesaid, until all other property subject to the payment of debts has been first sold, and it shall be shown to the court that the proceeds of such sales are insufficient to pay such debts; unless it shall be necessary to sell such slaves, or a part thereof, for the satisfaction of some debt that is secured by mortgage or other lien, on them; or unless such estate shall, by the exhibit of the executor, or administrator, or by other evidence satisfactory to the court, appear to be insolvent." (Emphasis volunteered.)

approval of the sale by the Probate Court, we would sustain its validity under the authority of the decisions of the Supreme Court. Neill v. Cody, 26 Tex. 286; *Moody v. Butler,* 63 Tex. 210." (106 S. W. 759.) In view of the court's language it is apparent that it would have upheld the present sale and deed. *None of the cases relied upon by petitioners nor any other Texas case holds invalid a sale by an administrator pro tem ordered as here by the court upon application and confirmed after hearing, all as prescribed by the statute.*

3. In appointing the administrator pro tem the court followed in all respects Sections 27 and 28 of the Probate Act of March 20, 1848 (Arts. 1136 and 1137, Hartley's Laws of Texas, p. 361), there being pending a "contest relative to the probate of a will."

4. Samuel W. Fullerton, administrator pro tem, filed written application setting forth a necessity for the sale of a portion of the estate to pay expenses of administration and debts, accompanying such application with a statement (R. pp. 516-519) as required by Section 54 of the Probate Law of March 20, 1848. The court, after a public hearing at which Walter Merriman, attorney for James W. Zacherie (R. p. 183) testified, found that the facts set forth in the application were true; that there was no personal property belonging to the estate in the hands of the administrator subject to sale; that all of the other property was encumbered by litigation and that a necessity existed to sell the land in question, the sale of which would be most advantageous to the estate (R. pp. 519-521), in this respect following Section 58 of the Probate Act

(Art. 1167, Hartley's Laws of Texas, p. 371, quoted supra p. 5). The sale was made at public auction, was duly reported to the court and confirmed as required by Section 67 of the Act (Art. 1176, Hartley's Laws of Texas, p. 373),[5] and the conveyance was duly executed in accordance with such statute which provided that the "conveyance of land * * * so made shall

[5]Art. 1176, Hartley's Laws of Texas, p. 373, being Section 67 of the Probate Act of March 20, 1848, reads as follows:

"Art. 1176 (67) That when a sale of property is ordered under the provisions of this act, it shall be the duty of the executor or administrator to make such sale, or cause it to be made in obedience to the order, at the earliest period; and when such sale has been made, it shall be the duty of the executor or administrator, to return to the court that ordered the sale, an account thereof—either in term-time or vacation—within thirty days after the day of sale. Such account of sale shall be in writing—shall specify the property sold—the name of the purchaser—the price for which it was sold, and the terms of sale; and shall be sworn to and subscribed by such executor or administrator, before some officer authorized to administer oaths—whenever such account of sale is returned, such return shall be noted in the minutes of the court; and at the term of the court when it is returned or if returned in vacation at the first term thereafter, it shall be the duty of the Chief Justice to enquire into the manner in which such sale was made; and if satisfied that it was fairly made and in conformity with law, he shall cause to be entered on the minutes of the court a decree confirming it, and ordering the account of sales to be recorded by the clerk, and a conveyance to be made to the purchaser of either land or slaves, by the executor or administrator; if not satisfied that such sale was so made, he shall cause to be entered in like manner, a decree setting it aside and ordering a new sale to be made. After any such decree of confirmation shall have been made, upon the purchaser complying with the terms of sale, the executor or administrator shall execute and deliver to him a conveyance of the property so sold, if it were either land or slaves, reciting therein the decree confirming the sale, and ordering the conveyance to be made; which conveyance of land or slaves so made, shall vest the right and title that the testator or intestate had, in the purchaser; and shall be prima facie evidence that all the requisites of the law have been complied with in making the sale; and such decree of confirmation of the sale of personal property other than slaves, shall in like manner vest the right and title thereof in the purchaser, and shall be like evidence that all the requisites of the law have been complied with in making the sale of such personal property."

vest the right and title that the testator or intestate had in the purchaser and shall be prima facie evidence that all the requisites of law have been complied with in making the sale." (*Seefeld v. Duffer* (CCA 5 Tex.), 179 F. 214, 221.)

5. Section 135 of the Probate Act of March 20, 1848 (Art. 1244, Hartley's Texas Digest, p. 395)[6] provided that the rights, powers and duties of administrators should be governed by the principles of the common law when not in conflict with the provisions of the Act. Under the common law it was the duty of any administrator, temporary or otherwise, to pay debts and expenses of administration, for such purpose having the right to use any of the assets in his hands. (*Ellis v. Deane* (1847), Beatty's Cases in Chancery, p. 5; *Tichborne v. Tichborne* (1869), L. R. 2, P. & D. 41; *Adair v. Shaw*, 1 Schoales & Lefroy's Rep. (Irish) 243; *In re Ellmaker's Estate*, 4 Watts (Pa.) 36). Under our statute, any power that could be conferred on a regular administrator might be conferred on an administrator pro tem. (*Callahan v. Houston*, 78 Tex. 494, 14 S. W. 1027; *Robinson v. Martel*, 11 Tex. 149), so that unquestionably the court could order a sale to pay expenses of administration and debts. But at all events the judgment attacked herein was a judgment of a court of general jurisdiction immune against collateral attack. (*Taffinder v. Merrill*, 95 Tex. 95, 65 S. W. 177, 93 Am. St. Rep.

[6]Section 135 referred to reads:

"ART. 1244 (125) That the rights, powers, and duties of executors and administrators shall be governed by the principles of the Common Law, where the same do not conflict with the provisions of this Act."

814; *Martin v. Robinson*, 67 Tex. 368, 379, 3 S. W. 550; *Dallas Joint Stock Land Bank v. Forsyth*, 130 Tex. 563, 109 S. W. (2d) 1046; *Carroll v. McLeod*, 133 Tex. 571, 130 S. W. (2d) 277; *Mast v. Orum*, 111 S. W. (2d) 1129, aff. 134 Tex. 105, 132 S. W. (2d) 105.)

6. The Schatzell petition for certiorari filed March 1, 1856 (R. p. 422), sought only to review and revise the proceedings of the County Court of Nueces County in denying their contest of the will of John Peter Schatzell and refusing a continuance, these being the only errors complained of and proceedings attacked in the petition (R. pp. 416-421). The effect of a certiorari proceeding under the Texas Statutes is confined "to errors of the County Court specifically set forth in the application for the writ" and does not suspend or affect any other ruling or proceeding (*Schwind v. Goodman* (Tex. Com. App.), 221 S. W. 579; *Leatherwood v. Stephens* (Tex. Com. App.), 24 S. W. (2d) 819; *LaFleur v. Switzer*, 109 S. W. (2d) 239; *Hurley v. White*, 66 S. W. (2d) 393; *George v. First Natl. Bank*, 67 S. W. (2d) 324, writ refused; *Wilson v. Fisher*, 105 S. W. (2d) 304, writ refused; *Landgraf v. Landgraf*, 114 S. W. (2d) 424), and the District Court of Nueces County by the petition for certiorari was invested with no other jurisdiction than to determine the alleged error in granting the application to probate the will and denying the contest thereof, clearly having no power to interfere with the sale of land by the administrator pro tem under orders of the County Court (authorities supra; also *Levy v. W. L. Moody & Co.*, 87 S. W. 205; *Pierce v. Foreign Mission*

Board (Tex. Com. App.), 235 S. W. 552; *Slay v. Davidson*, 88 S. W. (2d) 650, writ denied; *Pearson v. Holland*, 136 S. W. (2d) 920; *Mellinger v. Nicholson*, 142 S. W. (2d) 307).

7. Chief Justice Cahill was not disqualified, as held by the Circuit Court of Appeals, but if he were, the recognition of Fullerton as administrator pro tem by successor Chief Justices who were not disqualified, including the ordering of and confirmation of sale was sufficient on collateral attack. (*Seefeld v. Duffer* (CCA 5 Tex.), 179 F. 214; *Saul v. Frame*, 22 S. W. 984; *Moody v. Butler*, 63 Tex. 210; *Poor v. Boyce*, 12 Tex. 440, 449). The purchaser was not affected with notice of any alleged disqualification of Cahill in any event, not being required to go behind the application, order of sale, report of sale and order of confirmation, all of which proceedings were had long after Cahill retired from office. (*McNally v. Haynes*, 59 Tex. 583; *Poor v. Boyce*, 12 Tex. 440, 449; *Rindge v. Oliphint*, 62 Tex. 682; *Daimwood v. Driscoll*, 151 S. W. 621, writ denied; *Frost v. Crockett*, 109 S. W. (2d) 529, 535.)

Conclusion

It is respectfully prayed that the Petitions for Certiorari be denied.

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J. O. Phillips et al.

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(29)

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 222

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BARNSDALL OIL COMPANY, ET AL., *Respondents*

No. 222

MARY ZACHARIE BROCK, ET AL., *Petitioners*,
v.
BARNSDALL OIL COMPANY, ET AL., *Respondents*

REPLY BY FRANK A. ASH, ET AL., *Petitioners*, TO BRIEFS ON BEHALF OF *Respondents* OPPOSING WRIT OF CERTIORARI PRAYED FOR BY *Petitioners*

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MAY IT PLEASE THE COURT:

I

Such opposing briefs are conspicuously silent on the most important and vital ground set forth in our Petition; that is, the *Third* Ground, pages 12-13 in Petition for Certiorari. This ground is the Hamlet in this judicial tragedy.

For the purposes of this reply to such briefs, let us now re-examine such ground. Referring to pages 12-13 of Petition, we quote again from the opinion by the Honorable Circuit Court of Appeals, as follows:

> "Serious questions are raised as to whether the ultimate dismissal of the certiorari proceeding reinstated the probate of the will or left the parties out of court, and whether the bond given effected a proper supersedeas to stay probate proceedings. *As to these, we make no decision.*" (Italics ours.)

Upon such questions the trial court—the Federal District Court—ruled in favor of *Respondents,* in upholding the probate of the will and also holding as valid the sale by the administrator *pro tem* of a relatively small part of the great estate involved under the will.

Now, unlike the Federal District Court, the Circuit Court of Appeals *does not decide* questions involved as to "the probate of the will" and whether the "supersedeas" bond in the probate court, upon removal of the cause therefrom by certiorari to the District Court where trial ~~court~~ was de novo, under the Texas statute, "left the parties out of court," when the District Court subsequently dismissed the cause.

Referring to these questions, the Circuit Court says:

> "Serious questions are raised * * * *As to these, we make no decision.*" (Italics ours.)

The Schatzel will, here involved, covered a princely domain; the sale by Fullerton, administrator *pro tem,* covered only a small part of such domain.

As the case now stands, let us assume, for the purposes of this argument, that the *Respondents* have title duly adjudicated by the District and Circuit Courts, as to the lands *affected by the sale of the administrator.*

Even so, this leaves the lands *not affected by such sale by the administrator* clearly and unequivocally on the side lines of the decision by the Circuit Court of Appeals, under the express terms of the reservation—"As to these, we make no decision."

And what are these lands not covered by the sale of the administrator, but within the purview of the Schatzel will? And where is the title to these lands? The District Court says it passed under the Schatzel will; the Circuit Court of Appeals says, "we make no decision." If the Schatzel heirs at law assert title in another suit, will they be precluded and estopped by a Federal District Court decision which, upon appeal and presentation of such questions, the Circuit Court of Appeals, in express terms, says "we make no decision."

The Record herein (Tr. 443, 445), our *Petition* (pages 6, 7, 12), shows "Rincon" 1500 acres in the City of Corpus Christi, and Mustang Island (60 miles long and of great potential wealth), and the title to such property should not be the occasion for what is, in effect, a judicial "sit down strike" by the Circuit Court of Appeals.

Needless to say, a judicial decision by an appellate court, which, in its review of the holdings of the trial court, *withholds any ruling upon vital questions controlling title,* must place the administration of justice in a chaotic condition.

These vast properties of great value, the "Rincon" 1500 acres in the growing city of Corpus Christi, and Mustang Island in that same vicinity, are wholly outside the sale by Fullerton as administrator *pro tem* and in no manner affected thereby; but, as before stated, such large holdings are covered by the Schatzel will—the will which the Circuit Court of Appeals, for reasons beyond our ken, enshrouds in uncertainty, doubt and mystery by *withholding any decision upon the applicable questions pertaining to the validity of the will.*

"As to these (questions), we make no decision."

In the event these *Petitioners*—the heirs at law of Schatzel —institute suit seeking recovery of "Rincon" and Mustang Island, will it not be said that the judgments herein operate as an estoppel? If so, then these *Petitioners* are confronted with a condition whereby their asserted title will be defeated without even the gesture of a day in court—and through no fault on their part; because they duly urged such questions in the Circuit Court of Appeals. Is this due process of law as contemplated in our Federal Constitution?

From the standpoint of almost fabulous value, it would seem appropriate for this Honorable Court to review and reverse a judgment which "makes no decision" on such questions of great moment before it for decision.

And from the standpoint of assuring to the Bench and Bar the preservation of procedure looking to consistency and clarity in the administration of justice (and particularly in the judgments of the courts), it would seem that this Honorable Court may pertinently disavow the Circuit Court of Appeals' non-action in its ruling, "As to these (questions), we make no decision."

II

As to the other grounds in our Petition for Certiorari, we rest upon the authorities therein.

WHEREFORE, WE PRAY as in our said Petition.

Respectfully submitted,

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